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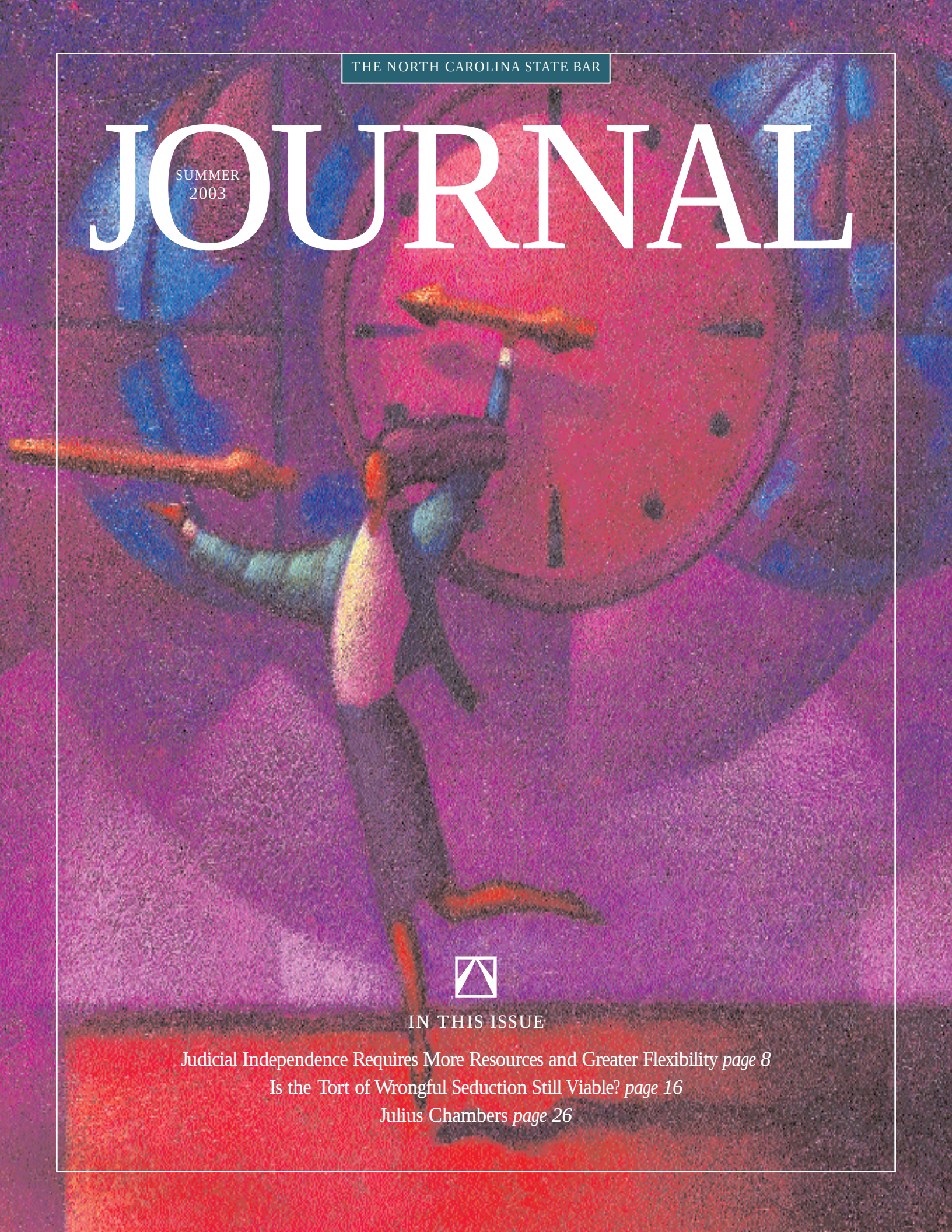


IN THIS ISSUE

Judicial Independence Requires More Resources and Greater Management Flexibility

By John Medlin and Rhoda B. Billings

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C.Const., Art. I, §6.

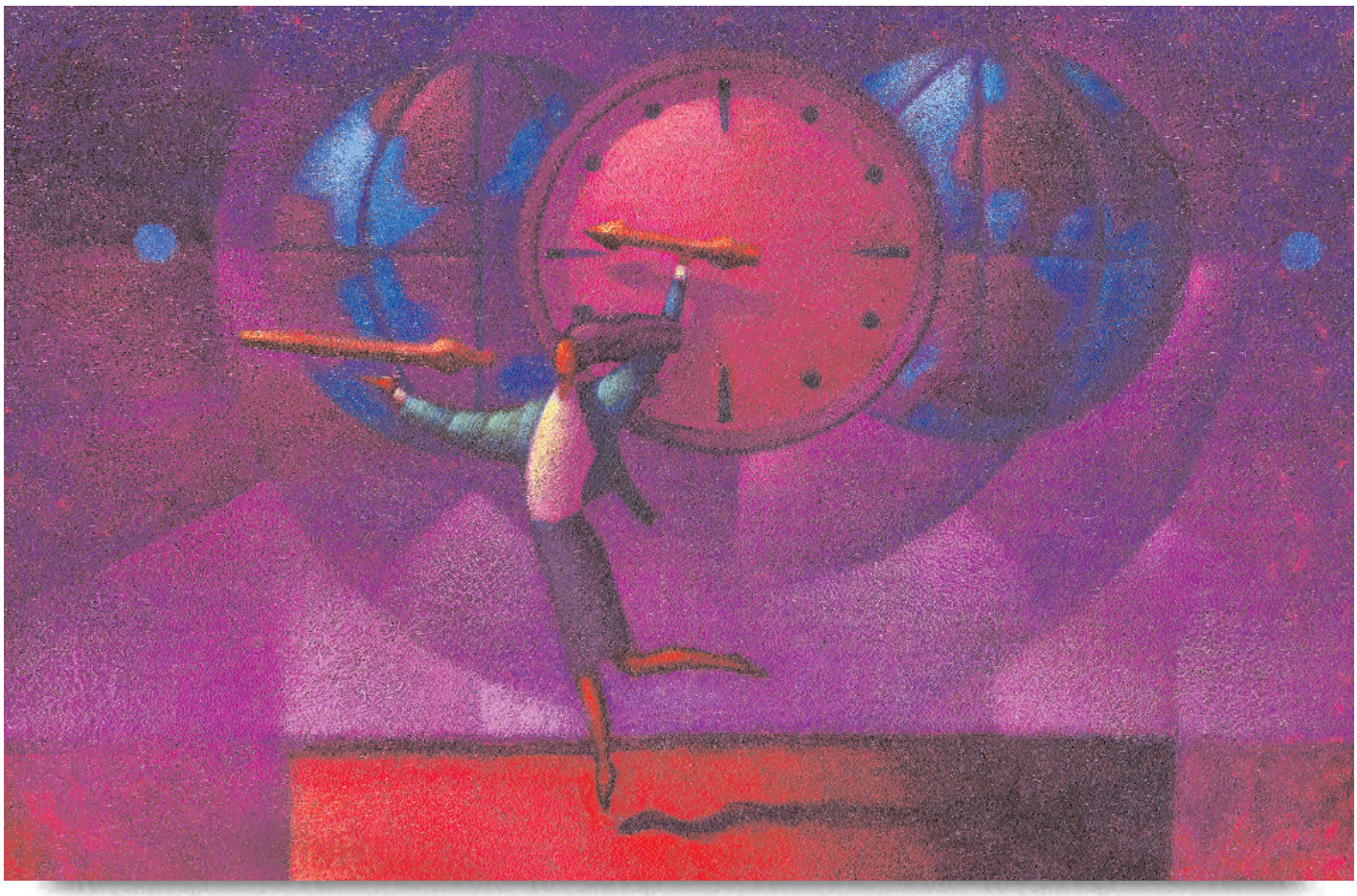
"All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice shall be administered without favor, denial, or delay." N.C. Const., Art. I, §18.

"The judicial power of the State shall, . . . be vested in a . . . General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, ..." N.C.Const., Art. IV, §1.

"The General Assembly shall provide for an administrative office of the courts to carry out the provisions of this Article." N.C.Const., Art. IV, §15.

" . . . The operating expenses of the judicial department, . . . shall be paid from State funds. N.C.Const., Art. IV, §20.

"The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this Article but the salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs." N.C.Const., Art. IV, §21.



Our thesis is this: An independent judiciary is essential to the proper functioning of our democracy. Judicial independence requires adequate funding for the courts. The courts have a constitutional right to adequate funding and may, in some cases, even compel the appropriation of the funds they need to function properly. For years the demands on North Carolina's courts increased dramatically while their needs have been demonstrably under funded. The effects of this under funding are exacerbated by the detailed purpose and line item limits placed by the General Assembly on the expenditure of funds that are appropriated. Fully adequate funding for all the courts' needs eventually must be achieved. However, as a first step, the judicial branch of government should be given greater flexibility and have accountability for the management of the funds that are appropriated.

The Importance of an Independent Judiciary to our Constitutional Form of Government

We begin by quoting from a variety of current and historical voices speaking on the importance of judicial independence to our constitutional form of government.[1] "Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture it has proven superior to any alternative form of discharging the judicial function than has ever been tried or conceived."[2] Judicial independence is "one of the crown jewels of the nation's system of government."[3] An independent judiciary is essential not only to provide all persons a fair and open forum for the lawful and peaceful resolution of their disputes and for the prosecution of criminal charges, "judicial independence is an essential ingredient of the protection of individual liberty and equality in our constitutional system. Moreover, the independent judiciary checks the legislative and executive branches of government, thereby maintaining our constitutional commitments . . . to separation of powers . . .."[4]

"The courts of justice are to be considered as the bulwarks of a constitutional government against legislative encroachments."[5]

"Judicial independence is the freedom that a judge should have to decide a case . . . based on the facts and the law, free from outside pressures . . .."[6] "A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; [and] that receives an adequate appropriation from [the legislature] . . .. Judicial independence includes the independence of an individual judge as well at that of the judiciary as a branch of government."[7] As Chief Justice John Marshall once said, "[T]he greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary."[8]

Judicial Independence Requires Adequate Resources

The Functional Need

We believe that, just as the judicial branch itself is no more an option in our constitutional form of government than are public safety and education, so an adequately funded and effective judicial branch is not an option. Justice in the courts is not a "service" that may be offered or withheld at the will of another branch of government. Nor may justice be denied or delayed through inadequate funding for the courts. If the power to withhold funding is the power to destroy, the power to provide inadequate funding is the power to cripple and eventually to destroy, just more slowly.

The North Carolina Supreme Court has identified the risk this way: "In the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable, for one branch is exclusively responsible for raising the funds that sustain the other and preserve its autonomy. The danger this fiscal structure poses for the balance of power has long been recognized:

> 'It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.' *The Federalist* No. 51, at 321 (J. Madison)(Arlington House ed.)."[9]

Constitutional Mandates

Many of the provisions of the North Carolina Constitution quoted at the beginning of this article express a constitutional mandate for adequate resources for the judicial branch.

Section 6 of Article I provides that "the legislative, executive, and supreme judicial powers of the state government shall be forever separate and distinct from each other." Yet if the legislature has the unfettered discretion to determine how much funding, if any, to provide for the judicial branch, the supreme judicial power is not separate or distinct from, but dependent on, the legislative power. A constitutional entitlement to adequate funding is therefore essential to maintain the required separation of powers.

Section 18 of Article I provides that "All courts shall be open; every person . . . shall have remedy by due course of law, and right and justice shall be administered without favor, denial, or delay." Yet if the legislature provides resources that become increasingly less adequate for the courts' needs, the courts will be open less, every person's remedy will become less adequate, and justice will be not only delayed but also eventually denied.

Section 3 of Article IV provides that the "General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government." Yet if it may provide funding that is less than adequate for the operations of the courts, it may effectively deprive the judicial department of its power by making it impossible for it to function effectively.

Section 20 of Article IV of our Constitution states categorically that the "operating expenses of the judicial department shall be paid from state funds." Thus, even though the General Assembly has the constitutional authority to raise revenues and make appropriations from state funds, the Constitution requires it to pay the operating expenses of the judicial department. Inherent in the obligation to pay the operating expenses is the obligation to provide funds that are adequate for the courts' operations.[10]

These constitutional provisions may alone provide sufficient support for the proposition that North Carolina's judicial branch of government is entitled to adequate funding from the legislative branch. However, the courts in some states have reached the same conclusion by relying on their inherent power as a separate and independent branch of government. The North Carolina Supreme Court addressed the inherent power of the courts to compel adequate funding in the leading case of *In Re Alamance County Court Facilities*, 329 N.C. 84 (1991). There it said:

> In order to preserve the independence of the judicial branch, courts in other states have exercised their inherent power even to seize purse strings otherwise held exclusively by the legislative branch, holding such intrusions justified by judicial self-preservation. . . . We hold that when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice.' [Citation omitted].[11]

Increasing Demands on Court Resources

Since our state's unified statewide court system was fully established in 1970, demographic, social, and economic trends have placed increasing demands on our courts. Between 1980 and 2002, the population of North Carolina increased by 41%, from 5.9 million in 1980 to 8.3 million in 2002.[12] Case filings increased even more: by 94%, from 1.6 million in 1980-81 to 3.1 million in 2001-2002.[13] The increase from 1999-2000 to 2001-2002 alone was 11%, from 2.8 million to 3.1 million.[14] Felony filings increased 5% in just the most recent year, from 96,000 in 2000-2001 to 101,000 in 2001-2002.[15]

More significantly, over the same time period cases became increasingly more complex and time consuming. Crimes have become more numerous and violent.[16] Pretrial proceedings, jury selection, trials, and post-conviction proceedings have all become more time consuming.[17] Death penalty cases, especially, are vastly more complicated and time consuming than they were before the reinstatement of the death penalty in 1977.[18] Juvenile crime has increased dramatically, and violent juvenile crime even more. The aging of the population has increased the number and complexity of probate matters and the need for judicial

guardianship proceedings. Not only did adoption by the General Assembly of the Rules of Civil Procedure in 1967[19] increase judicial time devoted to monitoring civil pretrial proceedings, the amount of civil litigation also has increased apace, with ever larger amounts of money at stake and trials increasing in complexity. Business litigation, especially, has become dramatically more complicated as North Carolina's economy has evolved from a local farm and manufacturing economy into one increasingly dominated by high tech enterprises engaging in nationwide and international commerce.

In the area of family law, modern views of the family call for a unified judicial approach to each family's legal problems, requiring even more specialized case administration skills. Changes in the law, including passage in 1981 of the act providing for equitable distribution of marital property,[20] have placed tremendous new burdens on the courts in the family law area, but little or no attention has been given to the increased demand placed on judicial and other resources.

The simple job of administering all these cases requires larger and more skilled staffs for judges, trial court administrators, district attorneys, and clerks.

The judicial branch now employs some 5,500 people, from Supreme Court justices to deputy clerks to DA victim-witness coordinators to AOC technicians and messengers. Increased court personnel requires more AOC personnel to handle salaries, benefits, supplies, equipment, and technology. Other factors place increasing personnel related demands on the courts' resources. Court security requirements had increased dramatically before 9/11 and have increased even more since then. Better accommodations are required for persons with disabilities. Sensitive personnel issues—from workplace safety to workplace harassment and discrimination to drug issues—require more and better ongoing training.

Decreased Ability to Perform Core Functions

The most visible result of these increasing demands is that the dockets of the courts have become increasingly backlogged. In a typical one-day criminal or traffic session of district court, it is not uncommon for 500 and even 800 cases to be on the calendar, with people standing three and four deep along the walls and overflowing into the corridors. The problem continues in superior court. For example, the median age for felony cases increased from 129 days to 150 days in just the last two years.[21] In one medium sized county, the median age of criminal cases pending in superior court as of June 30, 2002, was 306 days, and over 10% of the murder cases had been pending for more than three and a half years.[22] Not only is it true that justice delayed is justice denied, the practical day-to-day effect on ordinary citizens is that, as cases go undisposed of for longer and longer periods of time, parties, witnesses, and victims must return to court more and more often to deal with each case. Each trip to court involves unproductive waiting time and time off from work or other duties.

Not only is the core function of disposing of cases impaired, general service to the pub-

lic declines. More cases mean more people to be served when they file papers, make payments, and seek instructions. The increase in *pro se* litigation—people's increasing desire to handle court matters without incurring the expense of an attorney—demands higher levels of service from all involved in the court system and prolongs the length of the trials that do occur. As more and more people have more and more reasons to require information about court matters, the ability of court personnel to provide that information is stretched to the breaking point. The challenge of doing so promptly, accurately, and courteously becomes increasingly difficult.

Fair Trial Requires More than Judges, Prosecutors, and Clerks

For years, appropriations have been directed primarily toward increasing the number of so-called "core" court personnel, the assumption being that more judges, prosecutors, attorneys for indigent defendants, assistant and deputy clerks, and magistrates is the main thing needed to keep up with increasing demands on the courts. This is simply not so. Effective alternative methods of dispute resolution—arbitration, mediation, and case management, to name the most obvious—are equally essential to the courts' performance of their core function. There must be effective means to identify and resolve those cases that can be resolved without a trial, so that the trial resources of the courts are reserved for providing full and fair hearings to litigants involved in cases that can not be resolved by other means. Otherwise, simply putting more judges on the bench and clerks in the courtroom will be as effective as Sisyphus rolling the stone up the hill.

Up-to-date technology also is crucial if the courts are to perform their core functions. In every field of human endeavor, technology now frees people to do the things only they can do by relieving them of the burden of labor-intensive and time-consuming tasks that can be done more efficiently and effectively through technology. The courts have lagged spectacularly far behind most of the rest of our society in adopting technology to perform menial recordkeeping tasks, to manage information, and to inform decision-making. For example, docketing civil judgments—crucial to the security of all real estate titles in North Carolina—is still done by hand in giant red books stored on rolling shelves in the clerk's offices, as it was in the nineteenth century. Although much other court-related data is now recorded electronically, too often the technology used is outdated, employing data entry terminals that function essentially as they did in 1982 and storing the information in databases that do not communicate with each other. This is not for lack of desire, planning, or effort on the part of the Administrative Office of the Courts; AOC personnel have achieved outstanding progress with very limited resources. Limited resources is the problem.

Chronic Under Funding of North Carolina's Courts

Under Funding Demonstrated

The General Assembly has simply failed, virtually since the establishment of our unified statewide court system in 1970, to appropriate sufficient money to allow the courts to keep up with the increasing demands. Over the last five years, the judicial branch's percentage of total appropriations made from the general fund for the operation of state government has declined noticeably. From 1992-1993 through 1997-1998, this percentage averaged almost 3%, with a high of 3.03% in 1993-1994. Over the past five years, this percentage has averaged 2.7%, with a low of 2.6% in 2002-2003.[23] Though this difference may seem small, the extra 0.4% of total appropriations would have yielded over $57.5 million of additional funds for the judicial branch in 2002-2003 alone.

One negative effect of this under funding is an unacceptable increase in the workloads of judges and other judicial officials. Increases in the numbers of judges, magistrates, clerks, and prosecutors, though significant, simply have not kept up with case filings. As a result, since the 1983-84 fiscal year, the caseload per district court judge has increased 40%, the caseload per magistrate has increased 36%, the caseload per prosecutor has increased 36%, the caseload per clerk has increased 29%, and the caseload per superior court judge has increased 17%.[24]

Another negative effect of under funding for the courts is on judicial salaries. Judicial salaries have not kept up with salaries in the legal profession, despite keeping up with the cost of living. The result is that in 1998 (the year of the most recent economic survey by the North Carolina Bar Association), the base salaries of our trial judges ranked well below the median salary of all North Carolina attorneys who had been out of law school 12 or more years, and well below the 25th percentile of those practicing in the state's largest law firms.[25] The situation has not improved since then. This seriously impairs the state's ability to attract top potential jurists to the bench.

Other Disturbing Trends

There are other disturbing trends. One is the increased reliance on court costs to provide the revenue necessary to support the courts. Since 1981, the fee for the support of the General Court of Justice collected in district court criminal cases, including traffic infractions, has increased almost 400%, from $19.00 to the current $75.00.[26] The fee for filing a small claim action has increased 860% in the same period, from $5.00 to the current $43.00.[27] This is despite the fact that the overall cost of living has increased only 91%.[28]

The dynamic is this. The Administrative Office of the Courts presents the courts' budget requests to the legislative appropriations committees. As the legislative session goes on, it becomes clear that state funds will not be made available to meet all or sometimes even a portion of those requests. So a compromise is reached, and court costs are increased to provide additional revenue from which to fund at least a portion of the courts needs. In recent years, court cost increases have been used to fend off cuts in the courts' budget even deeper than those that have been made.

This trend raises three concerns. One is that criminal and traffic defendants are bearing an increasing portion of the cost of operating the courts, though they are among the least able to pay and the cost of collecting from them is itself an increasing demand on the courts' resources. The second concern is the appearance that the criminal courts, and especially the traffic courts, function largely as a money mill, in which the issuance and disposition of traffic citations may be driven more by revenue needs than by interests in traffic safety. The third concern is of potential constitutional magnitude. When court cost revenues provide a crucial portion of the revenues needed to pay judicial salaries and provide other judicial department resources, salaries of judges in general, if not those of an individual judge, begin to appear to be "dependent upon . . . the collection of costs," in violation of Section 21 of Article IV of the

Constitution.

A second disturbing trend is the increased reliance on non-state revenues to fund the operations of the courts. Grant funds from federal, local, and private sources are now an important part of the funding used in many counties for certain court functions, such as prosecutors, case managers, and drug treatment programs. Some counties are even funding actual positions in clerks' and district attorneys' offices,[29] undermining the very concept of a unified statewide court system and creating a widening gap between the quality of justice available in a few relatively well-off, largely urban counties and the quality of justice available in the rest of the state.

Reliance on Expansion Budget Encourages Under Funding

The problem of under funding begins with the nature of the General Assembly's appropriations process. For each biennium there is a continuation budget and an expansion budget. The continuation budget is a static budget that carries into each new biennium only the number of positions and the level of other expenditures that were approved for the previous biennium. It is intended only to maintain a constant level of expenditure; it is not intended to maintain a constant level of service in the face of increasing demand. Meeting increased demand for service is addressed in the expansion budget. The result is that the additional resources needed simply to maintain a constant level of service in response to increasing demand must be approved as if they provided an "expansion" of service. A true expansion of service, such as decreasing the number of cases per judge so that the cases may be more fully and fairly tried, would be at the outer fringe of the expansion budget process.

From the courts' point of view, this very process has resulted in a steady erosion of the resources needed to keep up. Two examples will illustrate this point.

A few years ago the AOC and the Conference of Clerks of Superior Court commissioned a study by the highly respected Jefferson Institute to improve the methods used in projecting the number of assistant and deputy clerks needed to keep up with increases in the various types of cases handled in our clerks' offices.[30] The Jefferson Institute recommended an annual increase of 50 assistant and deputy clerks statewide over the ensuing four years. Two of those four years have now gone by and not one new position has been funded. As a result, to arrive at the point at which the Jefferson Institute said the clerks' offices should be in 2005 would require the addition of 100 new assistant and deputy clerk positions in each of the two years of the upcoming biennium—an ambitious goal in the best of times and a hopeless dream in these economic times. But caseload increases do not halt for a budget crisis.

The second example is equipment replacement. All equipment eventually wears out or becomes obsolete and must be replaced. Replacing this equipment does not expand the amount of equipment available for court personnel; it simply maintains the number of pieces currently in use. Yet the continuation budget of the courts contains no funds whatsoever for equipment replacement. Funding to accomplish no more than replacing worn out pieces of equipment must be requested and appropriated in the expansion budget. The result is that right now it would take $1.9 million in the next fiscal year to replace copy machines more than five years old and $10.8 million in the next fiscal year to replace computers five years old.[31] It is hard to understand how this money could be viewed as "expanding" anything.

Remedies

Despite the increasing magnitude of the under funding of the judicial branch of government, we do not believe that the time has yet come to call on the courts to exercise their inherent power to compel the General Assembly to provide the resources the courts need. Our own Supreme Court has urged great caution in the exercise of such power. "Typically the appellate courts have tempered language about broad inherent power . . . with self-restraint regarding the reach into the public fisc. . . . The court's exercise of its inherent power must be responsible—even cautious—and in the 'spirit of mutual cooperation' among the three branches."[32]

We believe this spirit of mutual cooperation should be animated by an aroused bench, bar, and public. The Administrative Office of the Courts has for too long been virtually alone in advocating with the General Assembly and the governor for the needs of the courts. The normal mutual cooperation inherent in the annual budget process has not been without its accomplishment. But more obviously is needed if we are to achieve the goal of adequate funding for the courts' needs in the future. You readers and your clients, friends, and neighbors also need to press upon your legislators and upon the governor the urgency of the courts' needs for dramatically increased state funding.

Here are suggestions both for long-term goals and short-term strategies.

Increase Total Expenditures for the Judicial Branch

One way to insure increased expenditures for the judicial branch is to assure that the courts receive a greater percentage of total state expenditures. We believe that percentage should be at least 3%.[33] Fixed percentage funding is a neutral principal that works equally well in good times and bad. In good times it provides some assurance that the courts will share equally with the other branches of government in the increased expenditures provided by increased revenues. In bad times it assures that neither the governor nor the General Assembly may balance the overall state budget on the back of the court system by cutting its budget more than the budgets of more favored projects in the executive or legislative branch. It expresses the principle that no department, agency, or program in the executive or the legislative branch can be more exempt from budget cuts than is the judicial branch of government as a whole.

Even fixed percentage budgeting is only a means to a larger end. We simply must work together to convince the General Assembly and governor that a system of justice that deserves, and is able, to inspire public confidence requires a court system that is fully and adequately funded in all of its needs. It is not enough merely to keep pace with inflation and increasing caseloads, although that would be a huge first step. Eventually the courts need all the funds necessary to allow them to reduce significantly the time it takes to dispose of cases and to provide a prompt, full, and fair trial to every litigant whose case cannot be resolved by alternative means. This is what justice is all about.

Greater Flexibility and Accountability in Managing Judicial Branch Funds

Increasing the total appropriations for the operation of the courts to the level required to adequately meet their needs is, indeed, a goal of constitutional magnitude. However it is admittedly an ambitious goal, especially in hard economic times. Therefore, we propose a realistic short-term goal that can be

achieved immediately without any increased expense to the state. Give the judicial branch greater flexibility and accountability in managing the funds that it does receive.

This greater flexibility and accountability can be achieved in several ways, any one of which would be a significant step forward.[34] Here are the five steps we recommend:

(1) Make appropriations to the judicial branch non-reverting. Appropriations for the operation of the General Assembly have long been non-reverting,[35] and appropriations for the operation of the University of North Carolina System were put on a limited non-reverting basis over a decade ago.[36] The judicial branch needs to be on the same basis. Presently, any funds that are not spent by the Judicial Department in a given biennium "revert" to the state's general fund and may not be used by the Judicial Department in future years. Although the courts obviously are using every penny of the funds appropriated each year, non-reversion would still be a significant step forward. It would protect funds unspent by the middle of the fiscal year from being confiscated by the governor to balance the budget. It would mean that salary money saved when positions are held vacant for a period of time could be carried forward into the next year and used for non-salary expenses such as equipment and technology. It would mean that funds could be carried forward to a future year to take advantage of better prices, quality, and technology.

(2) Appropriations for the operations of the courts should be made on a single sum basis. Again, this is the basis on which appropriations for the operation of the University System are now made.[37] Presently, appropriations to the Judicial "Department" are made to certain specific budget purpose and program codes,[38] and within each purpose and program to a larger number of line items identified by object codes. Within each program and purpose, a bright line distinguishes the object codes for permanent personnel positions from the codes for all other types of expenditures. It is virtually impossible for the director of the Administrative Office of the Courts to move funds from one program or purpose to another. It is even more difficult to move funds within any program or purpose from one side of that bright line to the other.[39] By contrast, the single sum approach to appropriations would allow the judicial branch much greater flexibility in moving funds between programs as priorities and needs change. It would also allow it to shift funds from personnel to technology, equipment, or other court needs, and vice versa. This would result in a dramatic increase in the ability of the judicial branch to manage its own budget, to effect economies, and to put available resources to work where they are most needed.

(3) It should be made clear that, in times of falling revenues, it is the chief justice and not the governor who determines how the judicial branch will cut its budget. Presently, when state revenues decline, the governor has the statutory responsibility to determine how each state agency will reduce its expenditures, so long as reductions are made pro rata among all agencies.[40] The Judicial "Department" is treated like any agency in the executive branch. While the governor usually has deferred to the chief justice and the AOC Director in determining how the courts' budget should be cut, this restraint is self-imposed and not required by statute. We believe judicial independence requires that the chief justice have the ultimate authority to determine whether, and how, to reduce judicial branch expenditures in an effort to balance the state budget in times of falling revenue and that this authority should be made clear.

(4) The continuation budget of the judicial branch should be revised to include reserves for additional court personnel needed to keep up with projected workload increases and for the replacement of worn out and obsolete equipment. If these reserves were included in the continuation budget, the practical effect would be that, instead of the courts having to persuade a majority of the members of the legislative appropriations committees to include this funding in the next biennium's expansion budget, the funds would be included in the budget unless a majority of the committee members were persuaded to remove them.

(5) The judicial branch should be given substantial authority to manage its personnel. Again, this authority has already been given to the university chancellors[41] and is implicit in the way the General Assembly spends its money. This would apply at least to positions within the AOC itself, to support staff in the offices of judges and district attorneys, to assistant and deputy clerks of superior court, and to magistrates. Presently, all permanent positions in the judicial branch are specifically established and assigned by the General Assembly and funded in each year's budget. The number of judicial assistants for each judge, the number of assistant and deputy clerks for each county, the number of investigators for each district attorney, the number of law clerks for each supreme court justice, and, indeed, the number of printing press operators in the AOC's print shop, are determined by the General Assembly. Once created and assigned, these positions may not be abolished or transferred, nor may new positions be created, except by the General Assembly in a future year's budget.[42] Our recommendation would allow the AOC Director, for instance, to reduce the AOC print shop staff by one so as to add a computer programmer to a team developing new cost saving technology for the courts. It would allow the director to move a deputy clerk position from a county with a relatively light workload to one overwhelmed by unanticipated case filings. It would allow the director to respond to labor saving technology by abolishing two labor intensive positions and combining the two salaries to hire one highly skilled technician or an extra senior prosecutor for an overworked district attorney.

The North Carolina State Judicial Council has adopted proposed legislation to implement these five suggestions and has recommended enactment of this legislation by the General Assembly. We need your help to get them enacted. Most will not cost the state an extra dime. They all would allow the judicial branch to effect savings and use available funds more effectively. In that way they will at least help keep the courts from falling still farther behind in keeping up with the demands on their resources.

Please help by contacting your senators and representatives to express your views on these issues, which are so vital to the independence of our state's judicial system and to the effective functioning of our form of government. ■

Rhoda Billings is professor of law at Wake Forest University and a former chief justice of the North Carolina Supreme Court. John Medin is a retired chief executive officer of Wachovia Corporation. They are members of the North Carolina State Judicial Council. Medlin was chair of the Commission on the Future of Justice and the Courts in North Carolina, and Billings was a co-chair. The

authors wish to express their appreciation for the assistance in preparing this article provided by Thomas J. Andrews, General Counsel, North Carolina Administrative Office of the Courts.

Endnotes

1. We are indebted to the staff of the American Bar Association's Section on Judicial Independence for identifying these sources for us.
2. Fein & Neuborn, *Why Should We Care About Judicial Independence and Accountability of Judges*, Judicature, Vol. 84, No. 2 (Sept-Oct 2000).
3. *Uncertain Justice: Politics and America's Courts.* REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS. NEW YORK. THE CENTURY FOUNDATION PRESS (2000), at 13 (Quoting Chief Justice William Rehnquist).
4. *Uncertain Justice*, *supra* at 13.
5. Madison, THE FEDERALIST, No. 78, at 469.
6. League of Women Voters: Creating a Just Society: Judicial Independence, www.lwv.org/join/judicial/2001
7. *An Independent Judiciary: Report of the Commission on Separations of Powers and Judicial Independence*. Chicago. American Bar Association (1997), at ii-iii.
8. Address of Chief Justice John Marshall to the Virginia State Convention of 1829-30, *Proceedings and Debates of the Virginia State Convention of 1829-30*, at 616.
9. *In Re Alamance County Court Facilities*, 329 N.C. 84, 97-98 (1991).
10. The late Chief Judge Raymond Mallard of the North Carolina Court of Appeals, in his early article on the inherent power of the courts in North Carolina, expressed the view that the separation of powers provided for in Article I, §6, is somewhat compromised by the provisions that grant the General Assembly the power to pay the expenses of the judicial department, determine the salaries of judges, and establish an administrative office of the courts. Mallard, *Inherent Power of the Courts in North Carolina*, 10 WAKE FOREST LAW REVIEW 1, at 9-10 (1974). With due respect to Judge Mallard, we read these provisions differently. We read them as a constitutional mandate to the legislative branch to provide the courts with the resources they need to keep the supreme judicial power effectively separate and distinct from the legislative and executive power and to exercise the judicial power that is vested in the General Court of Justice.
11. *In Re Alamance County Court Facilities*, *supra* at 98-99.
12. North Carolina Office of State Budget and Management, NC State Demographer, http://demog.state.nc.us/demog/ncpopgr2.html.
13. North Carolina Administrative Office of the Courts, Annual Reports, 1981 - 2002.
14. *Id.*, 2000-2002
15. *Id.*, 2001, 2002.
16. Since 1998, convictions of violent felonies (Class A through E) have increased 17.6%, from 2644 to 3110, not counting convictions that fall outside the structured sentencing grid. *Table 1, Structured Sentencing Statistical Report for Felonies and Misdemeanors*, NC Sentencing and Policy Advisory Commission.
17. The Criminal Procedure Act, Chapter 15A of the General Statutes, was enacted in 1973. S.L. '73, Ch. 1286. One of its many innovations, the post-trial motion for appropriate relief procedure, N.C.G.S 15A-1411 *et seq*., has itself called for significantly increased judicial resources. Many decisions of the United States Supreme Court have also increased the length and complexity of criminal proceedings. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986)(challenges to use of peremptory challenges in jury selection - lengthens jury selection); Strickland v. Washington, 466 U.S. 668 (1984)(effective assistance of counsel - motivates extra attorney effort in all trial phases); Lego v. Twomey, 404 U.S. 477 (1972)(lengthens suppression hearings); North Carolina v. Alford, 400 U.S. 25 (1970)(calls for extensive inquiry into voluntariness of guilty plea).
18. N.C.S.L. '77, Ch. 406, §2, enacting N.C.G.S., Ch. 15A, Art. 100, Capital Punishment
19. N.C.S.L. '67, Ch. 954, §1, enacting N.C.G.S., §1A-1, Rules of Civil Procedure
20. N.C.G.S. Sec. 50-20.
21. North Carolina Administrative Office of the Courts, Annual Reports, 2001-2002.
22. AOC Statistical Tables, *Cases Filed and Disposed July 1, 2001 - June 30, 2002 and Cases Pending On June 30, 2002, District 16B Robeson*.
23. For fiscal years through 2001-2002: *North Carolina Counts 2001-2002: Statistical and Operational Summary of the Judicial Branch of Government*, North Carolina Administrative Office of the Courts, p. 20. For 2002-2003: Current Operations Appropriations Act of 2002, S.L. 2002-126, §2.1 amending S.L. 2001-424, §424. 2002-2003 figures subject to revision in Certified Budget.
24. *North Carolina Judicial Branch Statistical Report, January 2003*, North Carolina Administrative Office of the Courts Office of Research and Planning (draft).
25. Base judicial salaries for the 1996-1997 fiscal year were: district court judge $79,943; chief district court judge, $82,555; superior court judge, $90,915; senior resident superior court judge, $93,528. S.L. '95 (2ND Ex. Sess. 1996), Ch. 18, §28.3. The same year, median "cash compensation" for lawyers just 12 years out of law school ranged from $73,000 for sole practitioners to $251,155 for lawyers in firms with 40 lawyers or more. For lawyers 13 or more years out of law school, the range was $88,000 to $287,078. The 25th percentile of cash compensation for lawyers just 12 years out of law school ranged from $65,50 to $157,110; for those 13 or more years out of law school, from $55,000 to $165,640. *North Carolina Bar Association Economic Survey*, 1998, p. 34.
26. N.C.G.S 7A-304(a)(4) *as amended 1981-2002*.
27. N.C.G.S 7A-305(a)(2) *as amended 1981-2002*.
28. Bureau of Labor Statistics.
29. In 1999 the Director of the Administrative Office of the Courts was given specific authority to enter into contracts with counties and municipalities for the provision of services to the state in certain categories of cases. N.C.G.S 7A-64(a)(3), *added* by S.L. 1999-237, §17.17. This provision was enacted in part in response to long-standing concerns in large urban counties that State funding was inadequate to provide all the support needed by the courts in those counties.
30. *Analysis of North Carolina Clerks of Superior Court Resources and Procedures*, Jefferson Institute for Justice Studies (2000), p. 28.
31. Figures provided by the Administrative Office of the Courts Technical, Purchasing and Fiscal Services Divisions. They include equipment that is already five years old and equipment that will become five years old before June, 2004.
32. *In re Alamance County Court Facilities*, *supra* at 98-99.
33. As the result of the creation of our unified statewide court system, in which the exclusively state funded General Court of Justice is the only court in the state, North Carolina' courts are more dependent than are the courts of any other state on state funding, as distinct from county or municipal funding. Our counties provide only physical facilities for the courts and receive a facilities fee to defray that expense. Yet there are states that give their state courts an equal or greater percentage of total state expenditures, even though the state is responsible for only a portion of the total cost of operating the overall court system. *State Court Organization*, Bureau of Justice Statistics, www.ojp.usdoj.gov/bjs/pdf/sco9803.pdf. We would also point out that the budget for the Judicial Branch includes the costs for the operation of the District Attorney's Offices, although prosecution in, in fact, an executive rather than a judicial function. As far as we know, no other state includes District Attorneys' Offices in the budget for the courts.
34. Responses to an informal e-mail survey of state court administrators across the country, conducted recently by the Director of the North Carolina Administrative Office of the Courts, indicates that virtually all the state court administrators who responded have greater flexibility in managing their budgets than does the Director of the NCAOC.
35. N.C.G.S 143-18.
36. N.C.G.S 116-30.3, enacted by S.L. '91, Ch. 689, §296.2(a).
37. N.C.G.S 143-30.2. Lump sum appropriations for the General Assembly are also implied in the duties of the Legislative Services Commission. N.C.G.S 120-32.
38. For instance, clerk of superior court, district attorney, superior court, and administration typify the types of purpose and program codes under which funds are appropriated to the judicial department.
39. An extreme example of budget "micromanagement" is a provision in backup documents for the Current Operations Appropriations Act for 2002-2003 which prohibits the use of any State funds for out-of-state travel by Judicial Branch officials or employees. As a result, the Chief Justice paid his own way to the most recent meeting of the National Conference of Chief Justices and AOC department heads had to apply for a Crime Commission grant to attend a recent national meeting on court security.
40. N.C.G.S 143-25.
41. N.C.G.S 116-30.4.
42. N.C.G.S 143-23. With the exception of magistrates (for which each county's maximum and minimum number are specified in N.C.G.S 7A-133(c)), this detail is not found in any General Statute, or indeed in the published text of the current operations appropriations acts. It is found in the incredibly detailed supporting documents that are used by the budget committees to develop the budget. These documents are then tacitly adopted by the General Assembly in enacting the budget and form the basis for a document called the Certified Budget, which is the ultimate guide for each department's expenditure of the funds appropriated to it.

Is the Tort of Wrongful Seduction Still Viable? A North Carolina Court will Get the Chance to Decide

By Joanna Grossman

Nora Kantor, a young woman in North Carolina, has sued her ex-boyfriend for "wrongful seduction"—a little known tort that dates back several centuries. Many jurisdictions have abolished the tort, but in North Carolina, it may still exist. Kantor seeks to employ this age-old tort to address a more modern wrong: an alleged act of "date rape."

Kantor's Allegations Against Thompson

Kantor alleges that, after a fraternity Christmas party at Duke University, her then-boyfriend James Thompson forced sex upon her after she engaged in consensual kissing and petting. She claims she was "paralyzed with fear," was a virgin at the time, and did not want to have sexual intercourse. Thompson claims the sexual act began consensually, but stopped when she expressed ambivalence about continuing.

Kantor has sued both Thompson and his fraternity, Sigma Alpha Epsilon (SAE), which has since been disbanded. (Kantor claims SAE was referred to by some students as "Sexual Assault Expected.")

In her complaint, Kantor asserts, among other claims, that Thompson "wrongfully seduced and debauched" her through "persuasion, deception, enticement, and artifice." Those terms describe a common-law tort known as "wrongful seduction."

The Tort of Wrongful Seduction

The tort of seduction emerged centuries ago. Initially, it was a remedy for fathers who lost the working services of a daughter because she was "seduced and debauched" and became pregnant as a result of nonmarital sexual activity.

The damages were meant to compensate the father for the loss of his daughter's services, much as a master could sue if a third-party caused injury to his servant that rendered the servant unable to work. As Professor Jane Larson reports in an article about the history of seduction laws, the tort of seduction was one of the most common civil actions toward the end of the nineteenth century, and fathers were often successful before juries.[1]

By the turn of the twentieth century, the tort evolved—as Larson also explains—to recognize personal injury, rather than solely deprivation of a property right. Most states therefore granted the victim the right to sue in her own name. (Fathers could still sue as well, on the ground that they had a moral interest in their daughters' chastity).

In addition, consent became an issue. To prevail, a woman had to show either that she did not consent, or that her consent was given under duress, fraud, or coercion. She also had to show that she was previously "innocent"—that is, a virgin. Otherwise, courts reasoned, what damages could she show?

Why Most States Abolished Wrongful Seduction and Other Similar Torts

In the modern era, most jurisdictions abolished the claim of wrongful seduction. Similarly, they also abolished actions for "criminal conversation" (the commission of adultery with another's spouse), "alienation of affections" (diversion by a third party of a person's affections from someone who has rights to them), and breach of promise to marry.

All of these torts had been based on the idea of someone holding a property interest in another's chastity or affections. Thus, early forms of these torts made them actionable only by those who society saw as having an interest in that property—fathers, spouses, or perhaps employers.

Were the torts abolished because society took the more enlightened view that a woman's personal injury should be vindicated in a criminal prosecution for rape, and no other person had an interest in a woman's body but the woman herself? Professor Janice Villiers has argued that the answer, perhaps surprisingly, is actually no.

In most states, she contends, the causes of action were abolished, instead, due to a concern that plaintiffs would use them to wrongfully extort money from defendants—in other words, a concern that unchaste women would lie to cover up their sexual indulgences.[2]

North Carolina's Law of Seduction

What about North Carolina, the jurisdiction in which Kantor's suit has been filed? There, the tort of wrongful seduction has not been expressly abolished.

Indeed, to the contrary, a 1922 North Carolina Supreme Court opinion in the case of *Hardin v. Davis* expressly recognizes the tort. And more recent appellate cases in North Carolina have seemingly recognized the validity of the wrongful seduction claim, although they did so in cases that themselves failed on the merits.

Thus, North Carolina may still recognize the tort. If it does, it is not alone. About a third of the states today still recognize this sort of claim.

Hardin acknowledged the viability of a civil seduction claim when "intercourse was induced by deception, enticement, or other artifice," and when the plaintiff was, at the time of the seduction, an "innocent" and virtuous woman.

Kantor, according to her complaint, fits the bill: She alleges herself to be "chaste, innocent, and virtuous," and alleges the sexual act to have been the product of deception, coercion, or artifice.

What if Kantor had been unchaste? She still might have been able to sue. Under *Hardin*, a woman who had been unchaste, but had reformed herself could become "an innocent woman in the eyes of the law." Hence, she could sue for wrongful seduction although, the court noted, she might have her damages reduced because of her prior

unchastity.

Should Feminists Favor the Tort of Seduction?

Is the tort of seduction a good thing? Thompson's attorney argues it is not. According to the *National Law Journal*, he has characterized the civil seduction claim his client must confront as "rooted in outdated presumptions of male dominance and female vulnerability."[3]

To assess his claim, it's useful to set out a few background legal propositions. First of all, if Kantor's allegations are true, she was raped. As the California Supreme Court held recently in *In re John Z.*, a man who continues to have intercourse with a woman who initially consented to intercourse but subsequently changed her mind has committed rape. Moreover, Kantor alleges that she did not consent to intercourse at all, but only to sexual touching.

Second, there is currently no such thing as a civil claim for rape: A prosecutor decides whether a rape claim can be pursued. But where rape has been committed, other civil claims besides the wrongful seduction tort will almost certainly also have occurred. Kantor has listed three of them in her complaint: assault, battery, and intentional infliction of emotional distress. (Although "assault and battery" is a familiar criminal charge, assault and battery, unlike rape, can also be the basis for civil claims.)

There probably should be a civil tort claim, however, that is simply for rape (like the civil wrongful death suit that can be applied in cases of murder), and that does not require the elements of assault, battery, or intentional infliction of emotional distress. (The last is notoriously difficult to prove.) The federal Violence Against Women Act tried to grant women a civil action against men who committed violent sexual acts against them, but the Supreme Court struck down that aspect of the statute a few years ago.

Having a civil claim for rape would mean that even a woman who could not convince prosecutors to take her case, or whose proof was strong, but not beyond a reasonable doubt, could still recover damages. (Think, by comparison, of the claim Nicole Brown Simpson's family successfully brought against O.J. Simpson after he was acquitted for her murder.)

The problem, though, is that the claim for wrongful seduction is not exactly a civil tort claim for rape. Even putting its plainly sexist history aside, its modern elements continue to mean that it falls short of a civil claim for rape. Worse, it does so in disturbingly sexist ways—ways that will hurt many genuine rape claims.

First, it does not focus on consent, but trickery—requiring that "intercourse was induced by deception, enticement, or other artifice." But if a man forces a woman to have sex, he should be liable for damages such as her hospital and psychiatrist bills, whether or not he also tricked her into it.

Second, it requires chastity. But any woman—even a prostitute—can be raped or otherwise violated. To make a cause of action depend on virginity is archaic indeed. If Kantor had had consensual sex with a prior boyfriend, and if her allegations are true, her alleged rape by Thompson would not be any less grave. A woman need not preserve her chastity to deserve the law's protection.

What about a hypothetical case different from Kantor's, though—in which there was only trickery, and no rape? If states establish a civil action for rape, should they also establish a civil action for sex-by-trickery? That is a far more difficult question.

On one hand, getting someone to do something that harms them by lying to them is generally known as fraud—which can be the basis for a civil lawsuit or a criminal prosecution. And being intimate with someone, then later learning they lied to you, can certainly cause psychological harm.

On the other hand, establishing a sex-by-trickery action may assume that sex itself harms women, by robbing them of their chastity—another archaic assumption. And if the harm is the harm of sex-plus-the-lie, not just sex, then aren't we back in the territory of fraud? Is it really necessary to have another cause of action?

The tort of seduction will probably disappear from the law eventually. In the meantime, while it may serve to compensate women for sexual violation, it also reinforces disturbing stereotypes about women's vulnerability, need for protection, and lack of sexual autonomy. ■

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University. This article originally appeared on the FindLaw website (www.findlaw.com).

Endnotes

1. Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit": A Feminist Rethinking of Seducation*, 93 Colum. L. Rev. 374 (1993).
2. Janice D. Villiers, *Clergy Malpractice Revisited; Liability for Sexual Misconduct in the Counceling Relationship*, 74 Denv. L. Rev. (1996).
3. Eric Frazier, *Assault Allegations Bring "Civil Seduction" Suit*, National Law Journal, Feb. 3, 2003, at A5.

Are Unnecessary "Holdings" Dicta?

By Thomas L. Fowler

Distinguishing holding from dictum has never been the easiest task that attorneys and judges perform. It has been observed that "[d]ictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it."[1] A learned friend of mine even claims that the importance of the holding/dictum distinction is overrated. My friend says that the holding/dictum distinction has always been a difficult one to apply,[2] that law schools make little effort to teach it, and that practicing attorneys and judges only raise the distinction when they have already decided what they want to do and are looking for an after-the-fact justification of their decision.[3]

Under my friend's theory, all statements found in an appellate opinion are fair game to be cited as being the law, and the compelling force of the statement is based more on the clarity of its pronouncement and its author, than on an analysis of whether the statement resolved a necessary issue in the narrow matter that was technically before the appellate court. My friend says that under current practice, statements in appellate opinions are valued along a continuum rather than divided into the two classes: (1) statements that are binding, i.e., holdings; and (2) statements that can be, but need not be, followed, i.e., dicta.[4] My friend's arguments are not lightly dismissed. Indeed, some appellate opinions appear to encourage this blurring of the holding/dictum distinction and the devaluing of the distinction's significance.

We all know that "[l]anguage in an opinion not necessary to the decision is obiter dictum and later decisions are not bound thereby."[5] Indeed, innumerable appellate opinions contain a version of the following phrase: "Due to our holding, we need not reach defendant's additional assignments of error."[6] This happens, for example, when an appellant argues several grounds justifying a new trial and the appellate court grants a new trial based on one of the assigned errors. In such cases, the appellate court's holding has resolved the matter, and resolution of the remaining assignments of error—even if the assignments of error might be meritorious standing alone—is no longer necessary to a resolution of the case. Appellate courts lack authority to resolve matters that are not properly before them.[7] But in a recent case the court of appeals held that an alternative holding, i.e., an unnecessary holding, constituted binding precedent.

Is *Williams v. McCoy* Authority to Issue Unnecessary Holdings?

In *Thompson v. James*,[8] an "important issue in the case" was the extent of the plaintiff's alleged injury and whether evidence that plaintiff contacted his lawyer before he did his doctor was relevant to this inquiry. The trial court had admitted this evidence on the grounds that it might indi-

cate that the injury was not as severe as claimed, or it might indicate that plaintiff had an unduly litigious nature—a proper ground for impeachment. The court of appeals appeared to approve of the trial court's admission of this evidence but concluded: "In all events the court's ruling was harmless since plaintiff's wife testified without objection that '[h]e called his lawyer before his doctor because it's customary for him to check with his attorney before he makes any move.'" Thus the holding in *Thompson* was that the alleged error of the trial court was harmless—and not that the trial judge had properly admitted the evidence. The latter conclusion was *not* necessary to the court of appeals' decision, and any apparent approval by the court of the trial court's decision was dicta.

But in *Williams v. McCoy*,[9] the extent of plaintiff's injury was also an issue and the trial court, over plaintiff's objection, allowed defendant to introduce evidence that plaintiff hired an attorney before she went to the chiropractor. On appeal, plaintiff argued that *Thompson* did not resolve this assignment of error, because *Thompson* had "found the admission of the evidence in question harmless, [so that] that portion of the *Thompson* decision concerning the date of hire question was dicta and therefore has no import."[10] The court of appeals disagreed, however, stating that the *Thompson* court's statements that: (1) the admission of the evidence was harmless; and (2) the admission of the evidence was not error; were "stated in the alternative," which apparently allowed, in the court's opinion, both to qualify as precedential holdings in *Thompson*.

In the *Williams*' world of analyzing holding and dictum, unnecessary language in an opinion was held to be precedential. In this world,[11] what then happens when an appellate opinion discusses several grounds for its decision, any one of which would be sufficient to justify the decision, and the opinion never specifies which of these grounds is its holding in the case? Are all of the alternative holdings precedential because each *could* have been the basis for the decision? Or are none of them precedential because none was *necessary* to the decision?[12]

Multiple Rationales for a Decision

Consider the case of *Howard v.*

Vaughn.[13] In *Howard*, the plaintiff sought an order extending the statute of limitations that was applicable to her medical malpractice action, which was expressly allowed by Rule of Civil Procedure 9(j). Plaintiff's motion was heard and allowed by a superior court judge who was a resident of a different county and judicial district but who, pursuant to North Carolina's system of rotation of superior court judges, had been duly assigned to hold the courts of the county in which plaintiff's suit had been filed. Defendant moved to dismiss on the grounds that the only judge authorized by Rule 9(j) to allow the extension was "*a resident judge of the superior court of the county in which the cause of action arose.*"[14] This 12(b)(6) motion was heard and granted by another superior court judge, who stated in his order that: (a) the language of Rule 9(j) was unambiguous and required a resident judge to consider the extension request; (b) the judge who signed the extension was not a resident judge; (c) two resident judges were present and holding court in the county at the time plaintiff sought her extension; and (d) the non-resident judge who signed the extension order lacked authority to grant the extension and therefore the statute of limitations had not been properly extended and had expired. The plaintiff appealed.

The court of appeals reversed, upholding the non-resident judge's authority to extend the statute of limitation under Rule 9(j). There were at least three possible grounds for the court's decision and the court's opinion discussed all three of these rationales without indicating which explanation constituted the holding. These rationales are summarized as follows:

Statutory Interpretation I: Although the language in Rule 9(j) specifying "a resident judge" seemed unambiguous to the trial judge, the language is actually susceptible of more than one interpretation either because it produces an absurd result or because it produces an unconstitutional result, so the language should be read to include a non-resident judge assigned to hold the courts of the county.[15]

Statutory Interpretation II: Even if the language in Rule 9(j) specifying "a resident judge" is unambiguous, another statute, G.S. 7A-47, provides: "A regular superior court judge, duly assigned to hold the courts of a county, ... shall have the *same powers* in the district ... *as the resident judge* ... of the district ... has ...." Based on this argument, in light of G.S. 7A-47 the legislature cannot give special authority to a resident judge—as Rule 9(j) appears to have done—while denying that same authority to a properly assigned non-resident judge.[16]

Reconsideration of Interlocutory Order: Because no appeal lies from one superior court judge to another, if defendant had objected to the non-resident judge's allowing the Rule 9(j) motion the proper course was to appeal the matter to the court of appeals rather than seek a Rule 12(b)(6) dismissal before another superior court judge.

The court's discussion of each of these rationales is rather cursory and incomplete. Each rationale, as presented, leaves important questions unanswered and apparently unconsidered.[17] Some of these problems with *Howard's* legal analysis might have been addressed or resolved, of course, if the court had expanded its opinion to be more comprehensive and to include more details and explanation. And it seems clear that the court's analysis is likely to have been more detailed and complete had it chosen a single rationale upon which to base its decision and to present in its opinion—rather than choosing to briefly outline the three independent grounds presumably argued by counsel in their briefs. But, in any event, if the judge who granted the order that was the subject of the appeal, i.e., the order granting the 12(b)(6) motion to dismiss, had no authority to enter the order, then the order was void[18] and it is arguable that the court of appeals had no authority to rule on the substantive validity of the order, i.e., both statutory interpretation rationales.

Conclusion

The long-standing rule that rationales and conclusions in an opinion that are unnecessary to the decision are dicta is justified legally on the grounds that a court lacks the authority, i.e., the jurisdiction, to resolve any issues beyond those necessary to decide the specific case before the court,[19] and practically, on the grounds that analysis not necessary to the resolution of the narrow issue resolved by the decision, even if fully briefed and argued by the parties, may not be fully considered by the court or have received the court's complete analysis and consideration.[20] The rule should not be lightly disregarded. If the appellate court feels the a properly briefed issue is deserving of comment, even if resolving the issue is not necessary for the court's decision, the court should so state—as appellate courts have often done in the past.[21] Separating holding from dictum is a hard enough task even without appellate opinions including several grounds or rationales for the decisions without direction as to which was the true basis for the decision.

In light of the widespread use of electronic legal research, it may be more important than ever for appellate judges to clearly state in their opinions what their holding is, and to avoid discussions of matters that are not necessary to that holding. These days most attorneys search appellate opinions electronically.[22] And Westlaw, Lexis-Nexis, and Loislaw will find those paragraphs in all the opinions in all the reported cases that contain the key words or phrases being searched[23]—but they won't tell the attorney whether that paragraph that contains those words or phrases is holding or dictum. And, if there on your computer screen is a sentence that says what you want it to say, you may conclude that your research is done. You may choose not to read the rest of the case to find out the specific issues that were the subject of the appeal. Or whether that part of the opinion was necessary to the court's decision. You may also choose not to look carefully at the remaining results of your search—even though those results may reveal a line of on-point cases overlooked by the first case you found. In other words, despite finding the perfect language contained in a sentence in a case that has not been overturned, your electronic search does not tell you of the significance of that sentence to the opinion in which it appears. The language may have been inadvertent, tangential, unnecessary, or not intended as the holding of the case. In other words, it might be dictum. And a whole other line of cases might actually state the controlling law on your issue. But the electronic search is so efficient, so inclusive, and so easy—who wants to spend the time reading the entire case or checking all 157 cases listed in the search results, when the perfect language appeared

in case number twelve? The temptation to just go with it is powerful.

There is surely a place for intended dicta in appellate opinions.[24] But those who take legal argument seriously[25] must not rest once they have discovered relevant language in an appellate opinion. It makes a difference if the language is obiter dicta,[26] intended dicta, or a necessary part of the case's holding. Although the holding/dictum distinction (or said another way, the precedential/persuasive distinction) may not be in perfect health, is sometimes obscure, and is not immune from manipulation by result-oriented attorneys and jurists, attorneys, trial judges, and appellate judges should not forego this analysis.[27] ■

Tom Fowler is associate counsel with the North Carolina Administrative Office of the Courts. He earned his BA in 1975 from the University of North Carolina at Chapel Hill, and his JD in 1980 from the University of North Carolina School of Law. The opinions expressed in this article are solely those of the author and do not represent any position or policy of the AOC.

Endnotes

1. Note, *Dictum Revisited*, 4 Stan. L. Rev. 509 (1951-52).
2. Many share my friend's opinion in this regard. *E.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, note 1, at 2003 (1994): "[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta." *See also* Earl Maltz, *The Nature of Precedent*, 66 N.C.L.Rev. 367, 393 (1988): "Rather than being a simple, easily defined monolith, the doctrine of stare decisis is a complex, multifaceted phenomenon whose diverse components reflect a variety of values. Such phenomena typically defy full and accurate description."
3. My friend didn't say it, but he would agree with the commentator who declaimed: "The principle of stare decisis is constricting. A statement of the law that conflicts with the view of a judge or an attorney may be decisive unless it can be avoided. Labeling the statement a dictum is one simple means of evasion. Few desire to endanger such a useful tool by subjecting it to the destructive light of analysis. A vague smokescreen is often a better weapon in the courtroom than a precise argument that the court may understand and therefore reject." Note, *Dictum Revisited*, 4 Stanford Law Review 509 (1952).
4. "[A]lthough the dicta of our Supreme Court are entitled to due consideration, such dicta are not binding on this court. *Napowsa v. Langston*, 95 N.C.App. 14, 25, 381 S.E.2d 882 (1989); "We, therefore, adhere and follow the rule laid down by way of dictum in Whitehurst v. Gotwalt ... not under the doctrine of stare decisis, but by reason of its soundness." *Ryan v. Trust Co.*, 235 N.C. 585, 590, 70 S.E.2d 853 (1952).
5. *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274 (1985).
6. *State v. Battle*, 136 N.C. App. 781, 787, 525 S.E.2d 850 (2000).
7. Most would agree that any statement, explanation, rationale, or observation that is not directly related or necessary to the outcome of the particular dispute that was before the appellate court, no matter how scholarly, insightful, or wise, is not binding precedent, because the appellate court lacks jurisdiction to pronounce any rule on hypothetical issues. *See* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego Law Review 1253, 1257-62 (2002).
8. 80 N.C. App. 535, 342 S.E.2d 577 (1986).
9. 145 N.C. App. 111, 550 S.E.2d 796 (2001).
10. It is not true that dicta necessarily has "no import." "[Dicta] should not influence the decision in this case unless it logically assists in answering the question we are now called upon to decide." *Muncie v. Insurance Co.*, 253 N.C. 74, 79, 116 S.E.2d 474 (1960).
11. There are other cases that appear to approve of alternative holdings. E.g., *State Auto Insurance Companies v. McClamroch*, 129 N.C. App. 214, 218, 497 S.E.2d 439 (1998)("We cite as an alternative basis for our holding ...."); *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 137, 539 S.E.2d 331 (2000)("Alternatively, we agree with Ms. Stallings that the grant of directed verdict was improper since there were unresolved issues that should have been decided by a jury."); *In Re Appeal of Worley*, 93 N.C. App. 191, 197, 377 S.E.2d 270 (1989)("As an alternative basis for our holding ...."); *In Re Peoples*, 296 N.C. 109, 164, 250 S.E.2d 890 (1978)("As an alternative ground for our holding ...."). *See also In Re Graham*, __ N.C.App. __, 569 S.E.2d 736 (10-1-2002)("Graham does not address her assignment of error regarding the finding that termination was in Areanna's best interests. *Although we treat the assignment of error as abandoned pursuant to Rule 28(b)(6), we further find no abuse of discretion by the trial court.*" (emphasis added)).
12. Some commentators propose that the stated explanations or rationales never constitute the holding anyway, and that the holding in a case consists only of the facts of the case and the outcome. According to this analysis, explanation, reasoning, justification, or rationale, even if directly related or necessary to the result, may be worth considering, applying, and following—that is, it may be powerful and convincing dicta—but it is dicta nonetheless. *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale Law Journal 161, 162 (1930)("The reason which the judge gives for his decision is never the binding part of the precedent."); Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 Pepperdine Law Review 605, 607

(1990): Judge Aldisert notes that *stare decisis* means to stand by what the court *did* and not what it *said*: "[A] case is important only for what it decides: for 'the what,' not for 'the why,' and not for 'the how.' ... Strictly speaking, the later court is not bound by the statement of reasons, or dictis, set forth in the rationale." *But see* Michael C. Dorf, *Dicta and Article III*, 142 University of Pennsylvania Law Review 1997, 1998-99 (1994): "I defend a view of the holding/dictum distinction that attributes special significance to the rationales of prior cases, rather than just their facts and outcomes. ... [A] too narrow view of holdings often serves as a means by which judges evade precedents that cannot fairly be distinguished."

13. __ N.C.App. ___ (Filed: 31 December 2002).

14. This language no longer appears in Rule 9(j). After this case Rule 9(j) was substantially amended and it now addresses when a non-resident judge can grant the extension.

15. To support this rationale the *Howard* court discussed the earlier case of *Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 636, 556 S.E.2d 629, 634 (2001), which found Rule 9(j) subject to judicial modification because a "*literal interpretation*" of the language would be unfair or violative of equal protection—and that the legislature could not have intended such a result. *Best* interpreted Rule 9(j) to allow the extension motion to be heard by a duly appointed but non-resident presiding superior court judge if the resident judge was "unavailable or nonexistent."

16. *Howard* also cited *Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 636, 556 S.E.2d 629, 634 (2001), for this proposition—and, indeed, *Best* does note the impact of G.S. 7A-47, although it must be viewed as an alternative holding in *Best*—and therefore as dicta.

17. The problem with the first rationale (Statutory Interpretation I) is that *Best* held that the non-resident judge had authority to grant the extension only if the resident judge was "unavailable or nonexistent." In *Howard* the second judge who granted the motion to dismiss explicitly found that two resident judges were both existent and available when the non-resident judge granted the extension. Thus if *Best* was on point and precedential, its application to *Howard* would seem to result in the conclusion that the non-resident had no authority to consider the extension. The problems with the second rationale (Statutory Interpretation II) are dual: (a) that, to the extent this holding was based on *Best*, the "holding" in *Best* was alternative and therefore not precedential; and (b) that *Howard* does not address how Rule 9(j)'s language is subject to modification by a statute (G.S. 7A-47) already in existence when Rule 9(j) was adopted. *See Rhyne v. K-Mart Corp*., 149 N.C. App. 672, 685, 562 S.E.2d 82 (2002)("To ascertain legislative intent ..., we presume that the legislature acted with full knowledge of prior and existing law ...."). The problem with the third rationale (Reconsideration of Interlocutory Order) is that the basic rule that one superior court judge cannot overrule another superior court judge, is subject to numerous exceptions, and some of these exceptions—which are not discussed in *Howard*—would seem to apply, e.g., reconsideration and overruling may be allowed if issue is one of jurisdiction, reconsideration, and overruling may be allowed if it is sought at a different stage of the proceeding or if motion before second judge is objectively different. *See generally* Thomas L. Fowler & Thomas P. Davis, *Reconsideration of Interlocutory Orders: A Critical Reassessment of Calloway v. Ford Motor Co. and Whether One Judge May Overrule Another*, 78 N.C.L.Rev. 1797, 1857-60 (2000).

18. If the rule barring reconsideration applies then the the second judge's reconsideration decision was without jurisdiction and is therefore a nullity. *See* discussion in Thomas L. Fowler & Thomas P. Davis, *Reconsideration of Interlocutory Orders: A Critical Reassessment of Calloway v. Ford Motor Co. and Whether One Judge May Overrule Another*, 78 N.C.L.Rev. 1797, 1854-55 (2000).

19. "[A] basic principle of common law adjudication is that a judge is empowered to decide the case before the court and only the case before the court. A judge has no authority at common law to enact an authoritative general rule to govern parties and situations that were not before the court. The judge in Case 1 could not decide how Case 3 must be decided, however broadly she may craft a rule to explain the decision in Case 1." Steven J. Burton, *An Introduction to Law and Legal Reasoning, Little Brown and Company*, 1985, at page 36. Professor Dorf calls this the legitimacy justification for the holding/dictum distinction. Michael C. Dorf, Dicta and Article III, 142 University of Pennsylvania Law Review 1997, 2000-2001 (1994). *Compare In Re Lynette H.*, 323 N.C. 598, 374 S.E.2d 272 (1988), a commitment case, the trial court found the respondent not to be mentally ill and therefore not commitable under the statute but the trial court also held that the applicable statute was unconstitutional. The court of appeals affirmed the trial court. The Supreme Court vacated the court of appeals' opinion noting that once the trail court found the respondent not to be mentally ill the matter was concluded and there was no jurisdiction to consider the constitutionality of the applicable statute.

20. One commentator calls this the accuracy issue: "Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of the law." Michael C. Dorf, *Dicta and Article III*, 142 University of Pennsylvania Law Review 1997, 2000 (1994). In 1821 Chief Justice John Marshall observed that one reason dicta should have no precedential value is because "[t]he question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

21. E.g., *Soles v. The City of Raleigh*, 345 N.C. 443, 447, 480 S.E.2d 685 (1997)("While unnecessary based on our holding above, we also elect, because of its importance, to discuss the City's second assignment of error."); *State v. Brown*, 312 N.C. 237, 249, 321 S.E.2d 856 (1984)("Although unnecessary to decision in this case in light of our holding that defendant is entitled to a new trial on the kidnapping charge, in the interest of judicial economy we address defendant's arguments relating to certain aggravating factors the trial court found in sentencing defendant for this offense. It is, of course, possible these issues may arise again upon retrial."); *North Carolina State Bar v. DuMont*, 304 N.C. 627, 641, 286 S.E.2d 89 (1982)("In light of our adoption of that portion of the court of appeals' opinion holding the evidence sufficient to support the conclusions of law stated by the commission, the resolution of this issue is unnecessary. However, in light of the serious conflict in contentions between the parties to this cause and for the guidance of the commission in future cases, we briefly answer that contention here."). Compare *State v. Stanton*, 23 N.C. 424, 428 (1841) (Ruffin, C.J.): "Upon the form of the indictment, the court would perhaps not be bound now to decide, since the other point disposes of the case here. But as the point may be material upon the next trial, and would, probably, soon arise in other cases, *we deem it fit to state the opinion we have formed on it, with the view of settling the question*." (emphasis added).

22. Years ago attorneys might have begun their legal research by using *Strong's Index* to find a case that addressed the legal issue at hand. Back then you would have read the case you found in *Strong's*—probably the entire case—to see if it was on point. Then you might have Shepardized the case to learn of later cases and developments in this area of the law. You would have gone to the library stacks, pulled all the listed cases, piled them on the table, and read each, one by one. Because you would have read each opinion, you would know what each case was about, what issues were important to the case and what issues were marginal or tangential. And because of how you were led to the case (i.e., Shepardizing an on-point case), you would, in general, not be interested in the tangential issues that happened to be contained in the case you were reading—it would only be by coincidence that such issues would be relevant to the issue you were researching. But even if it was coincidentally relevant, you would know it was only tangential to the case because you would have read the entire case.

23. The famous Boolean search. Boolean searching is based on a system of symbolic logic developed by George Boole, a 19th century English mathematician. Boolean search techniques are used to perform accurate searches without producing many irrelevant documents. When you perform a Boolean search, you search the computer database for the keywords that best describe your topic. The power of Boolean searching is based on combinations of keywords with connecting terms called operators. The three basic operators are the terms AND, OR, and NOT.

24. But maybe appellate judges should be cautious in their use of intended dictum. E.g., *Pugh v. Pugh*, 111 N.C. App. 118, 126, 431 S.E.2d 873 (1993): "Because we have resolved the case at bar pursuant to a more traditional Rule 11 analysis, however, we decline to consider the merits of adopting the bright-line rule presented by this alternative reasoning. *Instead we simply recognize its presence in the law and leave an in-depth analysis of that reasoning for future consideration*." (emphasis added).

25. For several fascinating articles on this subject see "*Symposium on Taking Legal Argument Seriously,*" 74 Chicago-Kent Law Review 317-822 (1999).

26. Obiter dictum: an incidental and collateral opinion offered by a judge. Black's Law Dictionary.

27. Regarding the trial court's authority to distinguish holding from dictum, *see* Thomas L. Fowler, *Of Moons, Thongs, Holdings, and Dicta: State v. Fly and the Rule of Law*, 22 Campbell Law Review 253 (2000).

Julius Chambers

From "The North Carolina Century: Tar Heels Who Made a Difference, 1900-2000"

BY MARTHA COOK VICK

In the course of his remarkable career as a civil rights attorney, Julius Chambers was always in the forefront of the struggle for social justice and for change in federal civil rights law. He rose to national prominence in the 1970's for his brilliant argument before the US Supreme Court in *Swann v. Charlotte Mecklenburg Board of Education*, the landmark case that established busing as an appropriate means to integrate the nation's public schools. Chambers's far-reaching efforts to secure constitutional rights for citizens had a major impact in the South and across the land, but were countered with threats to his life and with the firebombing of his home, his office, his car, and his father's business. In the face of this fierce racial bigotry, Julius Chambers stood with rocklike firmness, having never lost the tough and pugnacious quality that he developed as a child in North Carolina.

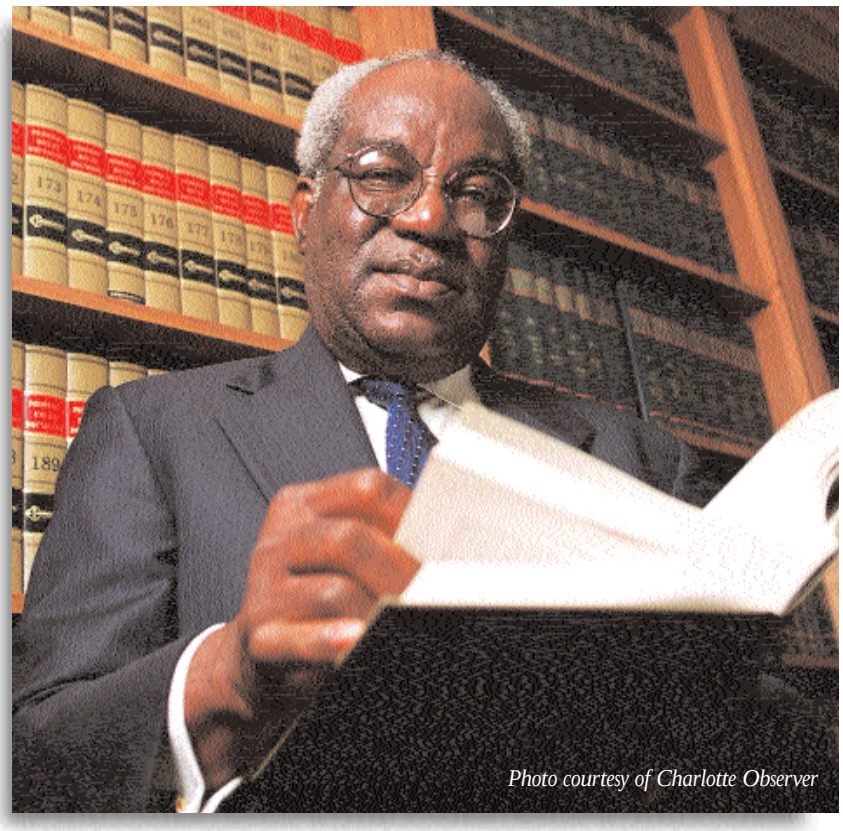


Photo courtesy of Charlotte Observer

Chambers's attraction to the law began when he was 12 years old and realized that his father's need for a lawyer to help him collect a bill from a customer was a matter far more important than an ordinary business dispute. "My father was an automobile mechanic and owned a garage," Chambers recalled. "He had fixed a truck for a white citizen who refused to pay him. No lawyer would represent my father. It wasn't right. I decided then to pursue a career that would change it." As a freshman in college, Chambers got a further perspective on racial discrimination when a driver forced him off an interstate bus for refusing to move to the back and give his seat to a white person. Such experiences shaped Chambers's approach to his legal career, but his exceptional intellect and caring heart for the disadvantaged were also qualities that made him one of America's leading civil rights attorneys and most enlightened and steadfast educational leaders.

Julius Levonne Chambers was born in Mt. Gilead on October 6, 1936, the third of four children born to Matilda Chambers and William Chambers. Though the family lived in the segregated South, with all the attending disparities in facilities and opportunities, his parents consistently encouraged their children to go to college. When Julius was 14 years old, he joined a mail-order book club that helped enrich his mind and overcome the disadvantage of having a limited school library and no access to the town's public library. He traveled 12 miles to Troy to attend Peabody High School, where he played football and baseball and was president of the student government association during his junior and senior years. He graduated in 1954 and entered North Carolina College (renamed North Carolina Central University in 1969) with excitement and anticipation. To him, the larger city of Durham seemed comparable to New York City.

As a college student, Chambers excelled in his academic work while also participating in the extracurricular life of the school. He was vice president of his class, president of the history club, president of the Alpha Phi Alpha fraternity, and president of the student body in his junior and senior years. He also played quarterback on the football team for two years. With his characteristic sense of humor, he commented on this experience: "I weighed 115 pounds, and after being thrown across the field by a long-time friend of mine, John Baker of Raleigh, I decided that was enough!" (Baker later became a professional football player.) In 1958, Chambers graduated summa cum laude with a BA degree in history. He won a scholarship to the University of Michigan and earned an MA degree in history in 1959.

While working in Washington, DC, in the summer of 1959, to earn money for a legal education, he met Vivian Giles, the sister of a college friend. He entered the University of North Carolina Law School in the fall of 1959, and he and Vivian married the following year. In his second year of law school, Chambers was voted editor in chief of the *North Carolina Law Review* and became the first African American to hold this position at any historically white law school in the South. He was inducted into the Order of the Coif, the national legal honor society, and into the Order of the Golden Fleece, the University of North Carolina's highest honor society for student leaders. In 1962 Chambers received his JD degree, ranking first academically in his class of 100 students. He spent the next year studying and teaching at the Columbia University School of Law, where he received an LLM degree in 1963.

US Supreme Court Justice Thurgood Marshall, then a prominent civil rights attorney and counsel for the Legal Defense and Education Fund, an affiliate of the National Association for the Advancement of Colored People (NAACP), selected Julius Chambers as the first legal intern for the Legal Defense Fund. Chambers worked for a year as a litigator in civil rights cases, including several involving Dr. Martin Luther King Jr., in Virginia, North Carolina, Georgia, and Alabama. "That experience," he remembered, "exposed me to the real practice of law. . . . I hadn't had anything like that in law school—that is, how one might develop legal theories to deal with unexpected and unusual situations." The contrast in Chambers's modest and soft-spoken manner and his aggressive litigation in the courtroom puzzled some observers. "I don't believe in yelling and screaming," he explained. "I believe in reasoning with people." Chambers's wholehearted dedication to the causes for which he worked rather than to personal celebrity also helped to account for his uncommon style.

After being urged by several black leaders in Charlotte to practice law in their city, Chambers established a law firm there in 1964 and continued to work with the lawyers at the Legal Defense Fund, litigating cases throughout North Carolina. "I took two summer interns, Adam Stein and James Ferguson," he recalled. "After they got out of law school, they joined the firm and we were the first integrated law firm in the state."

In 1965 Chambers filed the *Swann v. Charlotte-Mecklenburg Board of Education* suit on behalf of ten black families whose children had been denied admission to all-white schools. The case was named for James Swann, the first of these students who attempted to enroll in a white school. As the case began its path of appeals in the courts, Chambers's car was dynamited on a public street in New Bern as he met with African Americans in a nearby church. Later that year, Chambers represented 41 black plaintiffs in a suit to integrate the Shrine Bowl football game, a high school all-star event played annually in Charlotte's Memorial Stadium. Ten days after he filed this suit in federal court, Chambers's home in Charlotte was firebombed. "I don't know how we escaped bodily harm," he said, "except for the grace of God." In the next few years, their two children were born, Derrick Levonne in 1966 and Judy LaVern in 1970.

After the US Supreme Court unanimously upheld the previous rulings in the *Swann* case in 1971, Chambers's law office was burned. Undeterred, he continued to litigate civil rights cases involving the constitutionality of discrimination in housing, employment, and other private rights of citizens. In the early 1970's Chambers also emerged as a leader in higher education. He taught in the law schools at Harvard, Columbia, Virginia, and Pennsylvania, educating law students not only in the specifics of constitutional and civil rights law, but also in the need for legal advocacy of equal access to opportunities for all peo-

ple. A member of the board of trustees of North Carolina Central University, he began serving in 1972 as their representative on the board of the Consolidated University of North Carolina, the board responsible for overseeing the recently reorganized UNC system. During his five-year tenure on the Board of Governors, Chambers continually pointed out the inequitable state funding of the historically black colleges and universities, which, he argued, were prevented from playing an equal role with the white institutions in providing higher education. In 1977, two years before his term ended, Chambers resigned, frustrated with the futility of efforts to encourage voluntary state commitment to bring the black institutions up to par and with the board's delays in further integrating the universities and improving the opportunities for black students.

When he accepted the position of director-counsel of the NAACP's Legal Defense and Education Fund in 1984, Chambers moved to New York City, the once distant place that he had imagined with such excitement as a youth. Trying to prevent what he saw as the indifference of the US Supreme Court and the US Justice Department to the victims of discrimination in the country during the 1980's, Chambers supervised the litigation of cases that benefited racial minorities, women, and the disabled in the areas of voting rights, employment, school desegregation, capital punishment, and housing. He argued cases, directed 24 staff attorneys and several hundred cooperating attorneys across the nation, and organized an educational campaign to heighten awareness of the erosion of civil rights protections by the courts and the federal government.

In 1992, C. D. Spangler Jr., president of the University of North Carolina system, visited Chambers in New York to discuss the search for a chancellor for North Carolina Central University. When Spangler casually listed the first qualification as "someone who finished first in his class at the University of North Carolina Law School," Chambers was shocked, because he fit the description. While he had not considered becoming an educational administrator, Chambers began to see the chancellorship as an opportunity to improve and repay the institution whose professors had helped to shape his leadership skills. The first alumnus of the institution to serve as its chief administrator, Chambers became chancellor of North Carolina Central University on January 1, 1993.

Speculation about the possibility of his being appointed a federal judge began during the administration of President Jimmy Carter and continued through the early years of Chambers's tenure as chancellor. When Justice Harry Blackmun announced his resignation from the US Supreme Court in 1994, a number of legal, educational, and political leaders urged President Bill Clinton to consider Chambers as his replacement. Chambers later acknowledged having talked to representatives of both Presidents Carter and Clinton, but he withdrew his name from consideration in every instance, he said, because he was not willing to contend with the partisan politics within North Carolina's US Senate delegation, whose support would have been required for confirmation.

Instead, Chambers reduced his participation in the practice of law and focused on reestablishing North Carolina Central University as one of the best historically black universities in the state and nation. His love for students and their potential for leadership in society led to fast and significant change. As chancellor, he improved academic programs and performance by raising admission standards, establishing an honors curriculum, creating endowed chairs, encouraging faculty and departments to reach a higher degree of academic competitiveness, and engendering pride and spirit on the campus.

Even though he encountered opposition in the university community, Chambers promoted a more racially diverse student body. He actively recruited and enrolled white students, believing that students of all races have to learn to live together and respect each other. The reality that more black students were going to historically white institutions and thus causing a dwindling pool of candidates also influenced Chambers to make this bold push. "We all are better off because of it," he said. "I think all of us have learned in the process."

His insistence on better academic credentials from applicants caused even more vocal concern when enrollment dropped and triggered the loss of faculty and a portion of the university's state funding. Unwilling to settle for second best, Chambers weathered the controversy without apology while enrollment gradually increased and the university recovered from the losses. "We are showing people," he said, "that we have produced as good a student as can be found in any institution. We are having an impact around the country with the contributions that we have made, and we are all very proud of what we've been able to do with the limited resources we have."

He also worked to transform the university from an underfinanced undergraduate college into a major research institution. The Julius L. Chambers Biomedical Biotechnology Research Institute building and the School of Education's new building were testaments to both his farsightedness in advancing the university's involve-

ment in important academic research and training, and his effectiveness in obtaining increased state funding and major gifts for campus expansion. Chambers also extended the reach of the university beyond its campus with his initiatives on health and economic enterprise in Durham and his insistence on making community service a graduation requirement for all undergraduate students. Assessing where his alma mater stood at the end of his tenure as chancellor, he said, "We still have the problem with resources. We still have to address the inequities, and the state has to decide what our mission, the mission of the historically black colleges and universities, is going to be."

Unafraid to hold and express his independently achieved beliefs and positions in his several careers, Chambers exhibited that same self-direction in his participation in a broad range of humanitarian causes—from Native American, community, and children's groups to corporate boards and research institutes. His articles in respected law reviews and books contributed notably to the professional application of constitutional and civil rights law. He received many honors, including numerous honorary degrees, Distinguished Alumni Awards from the Columbia University School of Law and the University of North Carolina at Chapel Hill, and a rarely given Courageous Advocacy Award from the American College of Trial Lawyers. Also, he received the Kelly M. Alexander Sr. Humanitarian Award, the Aetna Voice of Conscience Award, the Congressional Black Caucus Foundation's Adam Clayton Powell Award for Legislative and Legal Perfection, and the Josephine D. Clement Award for Exemplary Community Leadership for Public Education in Durham.

Chambers retired as chancellor of North Carolina Central University in June 2001. Vivian Chambers believed that her husband probably would never fully retire, even though he put golfing and fishing on his agenda. Chambers said that he hoped to implement his vision of a cooperative program among the law schools at North Carolina Central University, Duke University, and the University of North Carolina, and perhaps teach in that program. He also planned to return to the practice of law in Charlotte. One of his main objectives, he said, would be to work for poor people's access to legal representation and to the courts. "The Constitution guarantees equal protection, but there is still a great deal of discrimination in this country. We still have work to do in education, employment, housing, health care, voting rights, and the administration of criminal justice."

Marsha Cook Vick is the author of Black Subjectivity in Performance: A Century of African American Drama on Broadway. *Dr. Vick was a speechwriter and research assistant for US Senator Terry Sanford and taught in the Afro-American Studies Curriculum at the University of North Carolina at Chapel Hill.*

This biography appears in The North Carolina Century: Tar Heels Who Made a Difference, 1900-2000. *To obtain a copy of this book, contact the Levine Museum of the New South in Charlotte, 704.333.1887.*

For more information, see:

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Tour de America

By Jerry Cash Martin

"3000 miles in 30 days!" That became the theme for my vacation last summer. After all, I had gone to school for 18 years and I had worked for 30 years. I was retired and ready for adventure, but this would be a little different. Two things would really ratchet up this project. I would go by bicycle and I would go solo.

Having always been relatively physically fit, I was not totally unprepared. I began running for recreation and health 20 years ago and have run over 100 races, including the New York City Marathon in 1998. I have cycled all of the east and west coasts of the United States. Also, I have actually cycled across the US before, although in sections during two-weeks vacations over the years. But "3000 miles in 30 days!"

The more I said it the more I became committed to it and the more I began to doubt my ability to do it. It averaged 100 miles per day whether I felt good or bad. I knew the terrain, too. Somewhere out there the road went up—it's called the Rocky Mountains.

I checked my bicycle. In the world of high tech cycling, she was nothing special, but had been my steady friend in the fog and high winds of the northern California coast and my shiny and bright *amiga* on my darkest days along the Mexican border towns in summers past. Several years ago I bought her secondhand for $125. Although she was an old Nishiki Riviera, I started calling her Niki long ago. Even though she looked pretty worn, she was an old friend and I have never given up on a friend.

I have also learned a thing or two about cycling over the years. Someone told me "Cycling is 98% perspiration and 2% equipment." Niki had outrun drunks in Flint, Michigan, bested the 20-mile climb on the California San Bernardino Mountains, and simmered at 113 degrees in the New Mexico desert. I shopped for her at Wal-Mart and decorated her with things I found along the roadside. No, Niki was definitely going.

When I finally started planning, I decided to travel very light. I would not camp as that would call for a sleeping bag, tent, rain fly, and ground cloth. Instead, I would take a credit card and stay in motels. Knowing how that works, I was pretty sure I would get stuck in the middle of nowhere with no motel in sight. I decided to take the southern route across the US as that would allow

me to wear T-shirts and shorts. Also, I could buy replacements for my T's and shorts at Wal-Mart while I shopped for Niki.

Maps were no problem. I knew I was going to fly my bike out to LA and start at the Pacific Ocean at the Santa Monica Pier. Although I tore pages out of my atlas, I never really needed a map anyway. As I told an incredulous friend, "The sun comes up in the east and settles in the west. I'm going east, so where's the problem?" Later it would result in a problem or two as I ran out of road on a couple of occasions. I love spontaneity though so I decided not to rely heavily on the maps, but head east toward the morning sun.

Several of my friends were concerned about my safety. The typical refrain was, "Are you crazy? Some nut will kill you." I know as we all do that there are dangerous people in the world. After all, I have tried enough of them as a trial judge for 24 years. But I have also learned something about humanity in those years. The world is filled with good people. I must say I believe most people are good, even the ones we try. To be frank, I always tried to be a tough judge, but I liked most of the people I tried.

In November 2000, my wife Carolyn and I stood at the top of the World Trade Center and marveled at New York City. In a few months this unbelievable spot would become Ground Zero. On September 11th, we all learned that the terrorists win if we give in to fear. No, I would not be afraid in America. This is our home, the land we love. With the roar of the fall of the Towers within sight of the Statue of Liberty fresh in my mind, I was not afraid some nut would kill me on this cycling trip; I was afraid some nut would take away my freedom.

I also knew the biggest secret about human existence. I read it somewhere and it was burned into my memory. "There is no force greater than the human soul on fire." Truthfully, I was pretty fired up about this trip.

With the promise to Carolyn that I would call every night, I boarded the flight for Los Angeles, watching to see if Niki made it to the cargo hold. Upon landing, I was relieved to see her box, although tattered and banged up, being pushed out to me. Since 9-11, we could not carry sharp objects on the plane so I had to hunt down someone with a knife to get inside the box. I found a young Hispanic gentleman, Domingo, who worked for Mexican Air, to help me.

Domingo became pretty excited about my cycling trip and tried to do most of the work opening the box and assembling Niki. While we worked, I learned that he was trying very hard to make it in the US, going to school and working at LAX. I took his picture with the bike and told him I would send him a copy if I made it. Now, LA is a big place, but it's filled with a lot of good people whom I had met over the years, so it was nice to hear Domingo say, "Vaya con Dios, Jerry. You will make it!"

I live in Mt. Airy, North Carolina, the hometown of Andy Griffith. It is Mayberry to many people. So you can imagine the contrast as I cycled Niki out into LA traffic, attempting to negotiate the airport and find my way to the Santa Monica Pier. A little later that afternoon, invigorated by the street battle, I pushed Niki onto the sand at the pier. A harsh, cool wind was blowing off the Pacific. Although I did not realize it at the time, it would be a cool reception for the start of the trip, but it would literally put wind in my sails for the journey. The wind would blow me west for the next five days.

Later that same afternoon, I was cycling through Hollywood, looking at the stars on the street at Hollywood and Vine, when I heard a hissing noise. It was not coming from two street bums. They were much too concerned with their bottle of cheap wine. And it was not coming from the pierced, tattooed couple sporting purple and fire-engine red spiked hair. It was a flat tire—my first, but unfortunately not the last. I would fix 22 of them over the next several days. I logged a few more miles dodging LA drivers and then I had another flat.

I hate a flat tire and have even cycled for hours on a flat because I did not want to fix it. I think that deep-seated resentment is based on more than just the messy, physical problem that needs a solution. A flat tire is a symbol: a failure. Someone has robbed me of my freedom to go. A tiny road terrorist has struck, but I will not give in. I will fix it and go, especially after a lady tells me, "You shouldn't be down here after dark."

It is probably 70 miles or more across greater Los Angeles. I had completed most of it when it began to get dark. I found a motel and a meal. The next day the wind blew hard. Now, the wind can be a friend or a foe. A strong wind can make as much difference as 50 miles cycled in one day. Years ago, I cycled from Manteo, North Carolina, to Ocracoke into a headwind, a distance of 80 or more miles. It took all day and I was so exhausted that I got off my bike, lay down by a fence near the lighthouse there, and did not get up until the next morning. The next day I had the same wind as I cycled back, but this time it was a tailwind. I made it comfortably in half the time. Now the wind would push me down the valley to Palm Springs and beyond for a total of 140 miles in one day. Over the next several days, following I-10, I rode across California and much of Arizona, averaging over a hundred miles per day.

The tailwind, the flat terrain, the great highway, and the heat energized me. The temperature always soared above 100 degrees each day, but I love the heat. I might as well have been flying. Three thousand miles in 30 days seemed possible.

Along the way I met a Native American named "Chief." It was night and I was walking around a little, hot, dusty town looking for a restaurant when I saw this old man dressed like an Indian standing outside a cowboy bar. His long, dark hair had faded and his face matched the craggy, brown mountains there. I ambled over and we talked for a while. He had served his country in Vietnam, transporting and stacking body bags of the young soldiers who had lost their lives. When he returned from the war, he had no job, no good way to deal with all the death he had seen, and, for the most part, no family. He developed a drinking problem and was barred from the local saloons. They called him "Chief" and he resented it. Like so many veterans I have known, he received little credit for what he did for us. I resented it for him, too.

All was going well as I exited I-10 to traverse Phoenix when I heard a hiss. This flat was not so bad though. I filled it with air at various service stations and made my way to Tempe, an upscale suburb of Phoenix, which sported a nice bicycle shop. I got a new tube and tire and a "Youdaman!" from the bike mechanic as I pushed on. The consensus of the youthful mechanics was that 3000 in 30 was possible, but not likely. I tried not to think they were commenting on my age, 53, and my physical condition, a chiseled kind of pudgy.

It is true that I was a little gray and wrinkled for this kind of effort, but I had an ace

up my sleeve they did not know about. This human soul was still on fire. Just four years before, I had cycled up to the Grand Canyon from there. I stopped in Flagstaff for the night and started out early for the climb up to the Grand Canyon. On the way up the snow-capped mountain, I crashed, causing a severe cut in my leg. I caught a ride back to the medical center and received 14 stitches. The doctor said I had a tattoo of the Grand Canyon on my left knee. That was the good news. The bad news was it had involved a cut in the muscle and he was not sure I could continue the trip. The next morning I got up, sore and stiff, mounted Niki, and we rode the 85 miles to the Grand Canyon. No, the 3000 in 30 was more than possible.

I kept thinking about the Rocky Mountains as I approached the San Carlos Apache Indian Reservation. Little did I know (since I was not reading my map) that I had a 22-mile climb up to Globe, Arizona, in front of me. Someone had told me it was about an eight-mile climb, but half way up the mountain, an old miner in Superior said the toughest was yet to come and it was another 12 miles. I learned something on that climb: "what don't hurt, don't work." I was also concerned (now that I had looked at a map) how the Rockies would be since this "little climb" did not even show on the map.

Giving thought to how to avoid another painful ascent, I cycled further south, hoping to avoid the peaks of the Rockies. I cycled I-10 across New Mexico and went down to El Paso, Texas. The Rockies still looked forbidding from there so I decided to try the pass from Tularosa to Ruidoso, New Mexico, which went through the Mescalero Apache Indian Reservation.

It was tough. The ascent would be 26 miles and I had to drop to my lowest gear in the first mile. I alternated standing up on the pedals and sitting down. It was hot. Overhead, Stealth fighters flew silently from the nearby White Sands Missile Range. They looked like black arrowheads in the sky. There were Native Americans all around, but none seemed very friendly. I pushed on from the desert floor.

As I worked on, I was getting very tired and noticed that the Indians were paying a lot more attention to me. They watched as I passed but did not speak. I was thinking, between panting breaths, Geronimo was an Apache. I had studied how badly we treated him, murdering his wife and children then betraying him repeatedly with treaties that were not honored. I remembered he had died in the early 1900's when my grandfather was 19. I was probably looking at his descendants and was wondering if there was any residual resentment. I could feel something in the air.

I was about two-thirds of the way up. My lungs were on fire and my legs would not have hurt more if they had been tortured by dragging cactus over them. Suddenly, a shrill "Ay-yah-yah, hay-ay" broke the stillness. An Apache was catching his horse and had called out to me. Not sure what he intended, I threw up my hand in a peaceful gesture. His lips parted and his white teeth spread behind an open smile. That's good, that's really good, I thought.

Several more miles passed. Indians stood in the field and at their houses and yelled again, "Ay-yah-ay-yah." Some raised fists into the air. I wondered what that meant.

Closer to the top, I climbed from the desert floor into some big timber. More Indians watched me. They yelled. Some Indian women stood in the yard and waved me on. They were smiling and I finally figured it out. They had seen hundreds of bicycle riders take on this mountain and had probably seen a lot fail, but it looked like I was going to make it. They were cheering me on. They appreciated the effort.

At the top I stopped at a store for a drink. The Apache who ran the store gave me a free drink and confirmed what I had thought. The Indians had been cheering for me.

"A lot of riders come here to this mountain. Not many come to this store," he spoke as he laughed. He could not believe it when I told him I was a retired judge. Since he had never met one, he said, "Here comes the judge," and invited his wife and children over to see me.

I cycled downhill for miles into Ruidoso, spent the night, then was treated to a roadside historical tour of the Lincoln County Wars where Billy the Kid had been a dangerous outlaw. I believe they had eliminated most of the outlaws by the time I rode through. It was mostly storekeepers, who wanted to hear about the climb. I rode to Roswell where I had a late lunch. I did not see any UFO's, but I could see one reason why that subject had become such a phenomenon there. The land had flattened out and all one could see was sky. I struggled on, still tired from the ascent the day before, until I got stuck in the middle of a new paradigm for me: prairie.

The wind had died several days before, but now it picked up. It was blowing east to west. At first the combination of the prairie and the headwind did not seem much of an obstacle since I was still reveling over the successful ascent. But after a while it became much harder than climbing a mountain. For six days I struggled across New Mexico and the hill country of Texas. If I did not pedal, I did not move. With sweat dripping down my forehead, I would occasionally look up, see a flag standing straight out in the wind, mutter a spicy word or two, and press on. After six days of that, it was like scratching a place that did not itch.

The doldrums though were broken by some of the best moments. Frankly, I met some of the nicest people in Texas. One lady came up to me at a store and put a few dollars in my hand. She said in admiration, "I always try to help out you young people. I can't believe that ya'll do this kind of thing." I was older than she, but it was nice to hear the compliment. I gave her the money back and told her how much I appreciated it.

I met another lady at a Wal-Mart. I was hunting down another tire and when I emerged from the store, a woman in a beat-up car said, "Where ya' goin'?" She looked rough. I thought maybe she was a prostitute or a panhandler so I replied, "Just travelin'" and continued on.

She kept talking and I kept listening. Before it was over, I was a little embarrassed by my misjudgment. After all, I am a judge and that's my job. It turned out she was an employee of Wal-Mart. She had MS and previously had cancer. She could not drive home immediately after her shift because she was so tired, so she slept for a while in the parking lot. The reason she looked so bad, she explained, was that the chemotherapy had ravaged her. She turned out to be very religious and quite a good person. She offered me a ride to the main road, which I accepted, and she also offered me money, which I did not accept. I offered her some money, which she refused. She said, "God will not bless me if I take your money."

It seemed to me God had given her an awfully hard road, but although her body was beaten, her heart was good. As she let me out at the road, a kitten ran out from

behind a tree. Someone had obviously abandoned it there. She went over and picked it up. She said, "You see, God has already blessed me," as she snuggled the kitten. Another little yellow kitten came from behind the same tree and I said, "Doubly so, it would seem."

And it was true on more than one level. She had a good mind and a good heart even though her body was about destroyed. I met numerous people like that, in fact, too numerous to list.

While I was in Texas, I rode across the Panhandle and the Red River Valley. I could see why they made up a song about the Red River Valley. It is beautiful and looks just like the middle of North Carolina.

The wind stopped blowing as I cycled into Arkansas. One street in Texarkana was particularly interesting—one side of the street is Texas and the other side is Arkansas. I wondered how the police dealt with that. Different state laws would apply to each side of the street. Your activity might be legal riding out and illegal riding back. I guess that is one reason they have judges there too. I was just glad I did not have to figure it out.

I wanted to go to Hope, Arkansas, to see where former President Bill Clinton was born. It is a small town, much like my hometown of Mount Airy. To some he is a great president of eight years of prosperity and peace and to others, he is "Slick Willie," who abused the highest office in the land and lied to the nation. I met him once, liked him, and wanted to see how he started. I saw where he was born and where he lived for several years. He had a very modest start. He is proof of the power of the dream. He must have dreamed very large because he started very small. It proved to me once again a belief I have that America is the land of dreams and opportunity for the weakest and poorest among us.

As I have ridden along America's highways, I have always found things of value. On this journey I found two very good knives, one of which was used in a picture in the *Winston-Salem Journal* about my trip. I gave it to my son as a memento. I also found several American flags. I adorned my bike with them and after a while, I was a traveling show.

Often people would ask me why I was cycling such a long way or what my "cause" was. I really did not have a "cause" in the beginning, at least, that is what I thought. As I rode along though, I thought more about September 11th and what it meant to me. I thought how much I love this country and its people. So as the journey progressed, I started telling people the trip was the "I Love America Tour."

In Tennessee I met another man who impressed me. He was a former state highway patrolman. Unfortunately, he had been stricken with multiple sclerosis and regrettably had to leave his employment. Although he walked with a cane and could not ride a bicycle, he loved bicycling. He worked with a group that paired sighted riders with blind riders on tandem bikes. Each year his group sponsors a tour for the blind. He was quite a man and amazed me with his fortitude. When many would wallow in their own disappointment and disability, he looked outward, helping those less fortunate.

I also met another gentleman in Tennessee who was a retired state employee, as am I. He suffered from emphysema, but he labored on to battle a proposed state income tax. Tennessee did not have an income tax then but was considering one. Since I have had enough tax to make me want to regurgitate (as has everyone else), I helped him spread the word. Later I learned that the Tennessee state income tax bill had failed. I wrote him a letter congratulating him, although I never heard back from him. Since he is the kind of fellow who would have written me back, I fear the worst. He had won the battle but lost the war.

Meanwhile, my patient wife Carolyn, who is quite the PR person, started alerting newspaper, radio, and television that I was coming home from the "I Love America Tour." When I pulled into my home county, two television stations and newspaper reporters covered the event. My family and friends waited for me in Mt. Airy as I cycled the last mileage to home. When I arrived for the welcoming rally, Carolyn had a huge banner up at Snappy Lunch celebrating the accomplishment.

There was more to come since I still had about 300 miles to go to the Atlantic Ocean. Carolyn notified Chief Justice I. Beverly Lake Jr. and David Hole, assistant director of the Administrative Office of the Courts, that I was going through Raleigh. When I stopped there, Chief Justice Lake came out to see me and presented me a cycling shirt in appreciation of the effort. I gave him an American flag I had found along the way. I gave David and Beryle Talton at AOC things I had found along the way, signifying my tremendous appreciation for all of those people and what they do for us. We have a great court system in North Carolina and I have been part of it for over 30 years, so it was nice to receive their acknowledgment.

I cycled on to Sunset Beach, North Carolina, completing the tour. It would be a total of 2,820 miles in 30 days, averaging 94 miles per day. Carolyn had alerted media, friends, and police there. I was honored to have a police escort the last mile. Thirty red, white, and blue balloons were released, sunbathers gathered, reporters assembled, and television cameras rolled as I pushed Niki out on to the beach, hoisted her over my head with the roar of the Atlantic in the background, and proclaimed, "And that's America, from sea to shining sea!" ■

Jerry Cash Martin is an Emergency Superior Court Judge in North Carolina. He resides in Mt. Airy and has written two novels, Accused and Convicted. He can be reached at cashmartin@surry.net.

The View from the Fifth Floor of the Justice Building (On a Clear Day)

By Thomas P. Davis and Thomas L. Fowler

The North Carolina Supreme Court Library is open for public use weekdays from 8:30 a.m. to 5:00 p.m., except on state holidays. The Library is located on the fifth floor of the Justice Building, 2 East Morgan Street, Raleigh, North Carolina.

I. Recently Published Articles of Interest to North Carolina Attorneys

Hon. James Andrew Wynn Jr., *Judging the Judges*, 86 MARQ. L. REV. 753 (2003): In this speech, Judge Wynn discusses the process of electing appellate judges in the various states, and surveys alternatives to partisan elections. A chief concern of his is that the perception of judicial independence, if not judicial independence itself, may be threatened by the "infusion of money, politics, and special interest groups into judicial elections . . . ."

Deb Newton, *The Honorable Robert Orr*, 29 WAKE BAR FLYER 8 (Apr. 2003): This interview with Justice Orr is the FLYER'S "second article of [its] two part series on the Appellate Bench election process . . . ." Justice Orr suggests that an appointment/retention scheme, with the chief justiceship rotating among justices, would serve the state better than either the former system of election, or non-partisan elections.

Proposed Authorized Practice Advisory Opinion on the Role of Laypersons in the Consummation of Residential Real Estate Transactions, 24 REAL PROPERTY 1 (Jan. 2003): "The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C.G.S. Sections 84-2-1 to 84-5) as they apply to residential real estate transactions." "Issue 1: May a non-lawyer handle a residential real estate closing for one or more of the parties to the transaction? Opinion 1: No. . . ." "Issue 2: May a non-lawyer who is not acting under the supervision of a lawyer licensed in North Carolina: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds? Opinion 2: Yes. . . ."

Tom Fowler, *Corporations Shall Not Proceed* Pro Se, 24 CAMPBELL LAW OBSERVER 3 (2003): Lexis-Nexis v. Travishan Corporation, 155 N.C. App. __ (2002) reads North Carolina law as within the majority rule that "corporations can be represented in court only by an attorney admitted to the practice of law," and characterizes State v. Pledger, 257 N.C. 634 (1962) (preparing legal documents), and Duke Power Co. v. Daniels, 86 N.C. App. 469 (1987) (pursuing an action in Small Claims Court) as exceptions to this rule.

Supreme Court Will Consider North Carolina Right to Life's Challenge to Federal Campaign Law, 8 THE CONSTITUTIONALIST 5 (2003): A North Carolina case, FEC v. Beaumont, will be argued this spring in the US Supreme Court. "North Carolina Right to Life, a non-profit advocacy corporation, challenged provisions of the Federal Election Campaign Act that bar corporations from contributing to candidates' campaigns, even if they raise money only through donations and have neither business interests nor shareholders." *See* Beaumont v. Federal Election Commission, 137 F. Supp.2d 648 (E.D.N.C. 2000), *affirmed by* 278 F.3d 261 (2002). *See* http://www.supremecourtus.gov/docket/02-403.htm.

Roy A. Schotland, *2002 Judicial Elections*, 76 SPECTRUM 18 (Winter 2003): "Twenty states had Supreme Court races in 2000, and candidates' funds rose to $45 million—a 61 percent rise over the prior peak—setting records in ten states. Additionally, independent interest groups (not political parties) spent about $16 million in the five hottest states: Alabama, Illinois, Michigan, Mississippi, and Ohio." "In the 2002 races, the total spent was much less than in 2000. Interest group spending was also apparently down, although not as much."

James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN L. REV. 1355 (2002): This article examines two separate and interrelated trends in state administrative procedure: the creation of central panels of state administrative law judges and the emerging trend of restricting or eliminating agency review of state administrative law judges' (ALJ) decisions, thereby making them actually or effectively final and subject only to judicial review." The author dedicates a section of this essay to the 2000 amendment to the North Carolina APA that "essentially eliminated any binding agency review of ALJ decisions." He also notes that the "choice of the courts as the ultimate factfinder when the agency disagrees with the ALJ is the most unusual aspect of the North Carolina statute. Of the three participants with decisional authority in the administrative adjudication, the courts have the least insight into the particular problems raised in the agency adjudication. The court neither heard the witnesses, as did the ALJ, nor does it possess the agency's expertise and experience in administering the statute. This decision was a political compromise."

ACCESSING THE LAW: SPECIAL SEC-

TION, 4 J. APP. PRAC. & PROC. (2002): Articles include: Kennerth H. Ryesky, *From Pens to Pixels: Text-Media Issues in Promulgating, Archiving, and Using Judicial Opinions*, at 353; Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, at 417; Deirde K. Mulligan & Jason M. Schultz, *Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives*, at 451; Eugene R. Anderson, Mark Garbowski, and Daniel J. Healy, *Out of the Frying Pan and into the Fire: The Emergence of Depublication in the Wake of Vacatur*, at 475.

Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253 (2002): Courts are confused about the power to raise and decide issues sua sponte because our appellate system embraces both the idea of the adversary process [law model] and the idea that justice should be done [equity model]. Opinions treat issues not necessary to the decision, not preserved by the parties, and not raised or briefed by the parties. This article focuses on issues not fully briefed but necessary to the decision. Citing to precedent not raised by the parties, or reframing their legal theories, may ensure that the law is correctly decided. But federal courts, the author argues, seem willing to go farther, raising an issue for the first time on appeal on the ground that it is easily resolved, or that an unbounded standard of "injustice" requires it. The author distinguishes 15 categories of such cases, and notes that they are hopelessly irreconcilable with the waiver rule. He concludes that "appellate courts should be more free in suggesting that parties rebrief or reargue an issue that will lead to the correct result when fact situations squarely present unbriefed issues."

William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53: "The Supreme Court is bound by precedent only to the extent it chooses to be. This is referred to as 'horizontal' stare decisis. Therefore, this article examines several cases dealing with highly volatile constitutional issues in order to uncover the true nature of horizontal stare decisis in the Rehnquist Court." "A review of Rehnquist Court stare decisis decisions does not reveal a coherent ideology or approach to overruling precedent."

Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002): "By the late-twentieth century the Supreme Court itself acknowledged that interpretation requires policy choices best left to political officials and used this observation to justify judicial deference to administrative interpretations of statutes. Having suggested that the policymaking discretion inherent in interpretation is best left to the political branches, however, the Court has not explained why judges retain the important interpretive role they do." "In this article, Professor Molot seeks to resolve this tension in the Court's jurisprudence by constructing a defense of judicial power that does not depend on judges being faithful agents of Congress."

Bryan J. DeTray, *Prometheus Unbound: Shaking off the Shackles of Unpublished Opinion as Precedent*, 50 THE FEDERAL LAWYER 30 (Mar./Apr. 2003): The author provides an overview of the issue of unpublished opinions, and then notes "The Judicial Conference of the United States is considering a proposal by the Justice Department to amend the Federal Rules of Appellate Procedure to provide uniform rules for citation of unpublished opinions. The issue will be taken up in May 2003."

II. Jurisprudence Beyond Our Borders

Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003): Singleton was convicted of felony murder and sentenced to death. Subsequently he filed an action in state court claiming that he was incompetent and could not be executed. The state placed Singleton on an involuntary medication regime after a medication review panel unanimously agreed that he posed a danger to himself and others. After the medication took effect, Singleton's psychotic symptoms abated. In January 2000, the state scheduled his execution for March 1, 2000. In February 2000, Singleton filed a petition for habeas corpus arguing that the state could not constitutionally restore his competency through use of forced medication and then execute him, citing the clear rule against executing the insane. The federal district court denied the petition, finding "no evidence in this record that the actions and decisions of the medical personnel involved were in any degree motivated by the desire, purpose, or intent to make Mr. Singleton competent so that he could be executed." The court of appeals affirmed, noting that the state's interest in carrying out the sentence outweighed Singleton's interest in avoiding medication, and Singleton's due process interests in life and liberty were foreclosed by the lawfully imposed death sentence and the procedures for ordering his medication.

Beuhler v. Small, 64 P.3d 78 (Wash. Ct. App., Div. Three, Panel Six, 2003): Beuhler, an attorney, made frequent appearances before Judge Small defending clients charged with criminal offenses. During these appearances, Beuhler noticed that the judge referred to and typed into a notebook computer kept on the bench. Beuhler particularly noticed that the judge referred to information in the computer during the sentencing phase of the criminal trials. Beuhler asked Judge Small to provide him a copy of the computer files in question. The judge declined to share the computer files with Beuhler. Beuhler next made a formal public disclosure request pursuant to Washington's public records law. Judge Small again declined. Beuhler filed a complaint seeking production of the computer file. Judge Small moved for summary judgment. After a hearing, the trial court granted the motion for summary judgment, concluding there was no authority to give a member of the public the right to examine and review the notes made by a judge for the judge's personal use in deciding cases. The trial court's decision was affirmed on appeal. The appellate court noted: (a) although the superior court is an agency, the judge's computer files are not public records for the purposes of the public disclosure statute; (b) in light of the strong public policy supporting the court's authority to control its proceedings, and the inherent desirability of protecting the court's subjective thought processes, there is no common law basis to access the judge's personal work-related computer files; and (c) there is no due process right to access the judge's personal notes because this personal work

CONTINUED ON PAGE 37

I Am From the State Bar and I am Here to Help You!

By G. Stevenson Crihfield

That statement would generate snorts, grunts, and outright laughter from a significant number of lawyers. To tell the truth, I also had mixed emotions over the years about the attitude of the State Bar on certain things.

I am now in my third year on the State Bar Council and I have served on the Grievance Committee and the Authorized Practice Committee. My personal experiences have resulted in a complete change of opinion about the State Bar Council and staff. Bearing in mind that the purpose of the council and the State Bar is to protect the public which includes inappropriate conduct by lawyers, I can safely say that I have been tremendously impressed with the work of the staff, the deliberations of the council, and the even-handed and sympathetic presentations of the staff regarding various issues as they pertain to lawyers and their activities. By the same token, they are equally cognizant of the need to protect the public from lay people who would attempt to usurp the functions of lawyers and to thus reduce the protection of the public from those who would not be under the same rules and regulations as the practicing bar.

Many lawyers have complained to me about the problem of having to respond to frivolous grievances and the costs that are incurred. One often-asked question is "Why can't we be reimbursed for the expense we are put to in these responses?" After examining this question I have come to the conclusion that it is not feasible to do so. It would have a chilling effect on the grievance process which is not desirable and it's enforcement against a grievant who files frivolously would be difficult if not impossible. It would seem that the only real solution is to continue the current process.

The best advice that can be given to such a person is to respond promptly to the grievance. Failure to do so is in itself a violation. I think you will find the staff willing to work with you if there are time problems in getting material together or your schedule of other pending matters.

In my opinion the Grievance Committee of the State Bar Council makes a very even-handed and fair appraisal of grievances. Lawyers who are working hard to do their work correctly and in a reasonable fashion have no reason to be concerned about the State Bar's reaction.

Another piece of advice that I would give to lawyers goes to their complaint that all the State Bar worries about is whether they return phone calls. When you read some of the grievances and see some of the things that are said about lawyers failure to communicate with the client, you have to wonder what a reasonable response time might be. Lawyers need to do a better job of educating their clients up front about what they can expect in terms of communication. We need to avoid over promising timeliness of services. We all know that there are matters which are important but not urgent and certain matters which are urgent and important. If it is a matter that does not have time constraints, find out and advise your client up front about the timeliness. You need to be candid with them about what they can expect and when they can expect it. If you can't work out an arrangement, don't represent the client in the first place.

My observation on the public these days is that they expect a lot and often don't understand the legal system. On the other hand, we don't do as good a job as we could educating clients about what is going to happen in their situation. Time pressures and other reasons are involved with this problem. We contend that we are good at educating other lawyers, judges, and juries; however, we don't do so where our clients are concerned. We need to work harder at this.

Lastly, if you have a problem with the State Bar, contact your local bar councilor. I think you will find they are very aware of the problems that practitioners face and are willing to help with advice and other suggestions about how to handle a situation.

It is true, "I am from the State Bar and I am here to help you!" ■

G. Stevenson Crihfield is a State Bar Councilor representing the 18th Judicial District.

Stand Out In Your Field—NOW is the Time to Apply for Specialization!

The Board of Legal Specialization of the North Carolina State Bar is pleased to announce that it is accepting applications for certification in the seven approved specialty areas: bankruptcy law, criminal law, estate planning and probate law, family law, immigration law, real property law, and workers' compensation law. Applications will be accepted through June 30, 2003.

You can obtain an application form from the "forms" section of the State Bar's website at www.ncstatebar.org (While you are visiting the State Bar's website, check out the link to the specialization website at www.nclawspecialists.org.) The form must be printed and filled out by hand or typewriter. Mail the completed application to the State Bar (no electronic filing—yet). A hard copy of the application form may be obtained by calling the State Bar at (919) 828-4620. Ask for Denise Mullen or Joyce Lindsay.

The application is relatively easy to complete. The information in the application will help the specialization board determine whether you have satisfied three of the requirements for certification: (1) good standing with the bar; (2) substantial involvement in the practice area (generally, at least 25% of a full-time practice every year during the five years prior to application); and (3) continuing legal education hours in the specialty area during the three years prior to application. The application also asks you to list the names of ten lawyers who will serve as peer references for you. If you satisfy the substantial involvement, CLE, and peer review requirements for certification, you will be approved to sit for the examination in your practice area on November 5-6, 2003. This year the exams will be offered in the following locations: Raleigh, Charlotte, Wilmington, and Asheville. For more information on the standards for certification in each of the specialties, reference the State Bar Rules and Regulations (27 NCAC 1D, Sect. .1700 et seq.) on both the State Bar and the specialization websites or call Alice Mine, Denise Mullen, or Joyce Lindsay at the Bar. ■

Fifth Floor (cont.)

file serves as nothing more than a memory aid and a record of work related impressions —it did not constitute evidence utilized by the court to determine a defendant's sentence.

Koffman v. Garnett, 574 S.E.2d 258 (Va. 2003): Koffman, a 13-year old middle school student at a public school, participated on the school's football team as a third-string defensive player. Garnett was an assistant coach for the team and was responsible for the team's defensive players. Displeased with the players' inadequate tackling, during a practice, Garnett ordered Koffman to hold a football and "stand upright and motionless" so that Garnett could explain the proper tackling technique to the defensive players. Then Garnett, without further warning, thrust his arms around Koffman's body, lifted him up and slammed him to the ground. Koffman weighed 144 pounds, while Garnett weighed approximately 260 pounds. The force of the tackle broke Koffman's arm. Koffman's lawsuit for assault and battery was dismissed by the trial court because the instruction and playing of football are "inherently dangerous and always potentially violent." The appellate court reversed, noting that the case went beyond the circumstances of simply being tackled in the course of participating in organized football. Garnett's knowledge of his greater size and experience, his instruction implying that Koffman was not to take any action to defend himself from the force of a tackle, the force he used during the tackle, and Garnett's previous practice of not personally using force to demonstrate or teach football technique could lead a reasonable person to conclude that, in this instance, Garnett's actions were imprudent and were taken in utter disregard for the safety of the player involved. Because reasonable persons could disagree on this issue, a jury issue was presented.

State v. Shreves, 60 P.3d 991 (Mont. 2003): Defendant Shreves was found guilty of homicide. Shreves was sentenced to a term of 100 years, with no parole for 60 years. The trial court based its sentence on its assessment that Shreves was a violent and dangerous offender, on Shreves' extensive past history of violence, on the nature of Shreves' offense, which it characterized as a cold-blooded, premeditated killing, and on Shreves' failure to show remorse or accept responsibility for his actions. At trial, Shreves had testified on his own behalf and asserted his innocence. At sentencing, Shreves chose not to testify, but his counsel indicated he maintained his innocence. On appeal, defendant argued that the trial court should not have based its sentence on his failure to show remorse or accept responsibility for his crime. The Supreme Court agreed, noting that the trial court based its conclusion that defendant lacked remorse on defendant's silence at the sentencing hearing. While rehabilitation is an important sentencing factor and lack of remorse is a legitimate factor to consider at sentencing, a sentence based on a refusal to admit guilt cannot be upheld. To do so would reflect an inquisitorial system of justice rather than the adversarial system. The trial court improperly penalized defendant for maintaining his innocence pursuant to his constitutional right to remain silent. ■